

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 790.

THE UNITED STATES AND INTERSTATE COMMERCE
COMMISSION, APPELLANTS,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF PENNSYLVANIA.

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b (Cover:) No. 38. November Term, 1915. In the District Court of the United States for the Western District of Pennsylvania. In equity. The Pennsylvania Railroad Company, complainant, vs. The United States of America, defendant. Petition. Patterson, Crawford & Miller, Solicitors and counsel for complainant. Filed July 3, 1915, J. Wood Clark, clerk.

1 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, COM- plainant, vs. THE UNITED STATES OF AMERICA, DEFENDANT.	}	In Equity. Term, 1915. No. .
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PETITION.

To the Honorable the Judges of the said court:

The Pennsylvania Railroad Company, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, brings this, its petition, against The United States of America.

And thereupon your orator complains and says:

1. That it is a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, having

2 been incorporated by an act of the General Assembly of that Commonwealth approved April 13th, 1846, entitled "An act to incorporate the Pennsylvania Railroad Company," and is a common carrier by railroad, possessed of all and every the corporate rights, privileges, and franchises conferred by said act and by divers other acts supplementary thereto and amendatory thereof. That its principal operating office is located in the city of Philadelphia, in the State of Pennsylvania.

2. That the Crew-Levick Company is a business corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, engaged in the business of refining crude oil, and having its residence and principal office in the city of Warren and State of Pennsylvania, within the limits of the Western District of Pennsylvania.

3. That on or about the 26th day of February, A. D. 1913, the said The Crew-Levick Company filed a certain petition before the Interstate Commerce Commission of the United States against the complainant herein, the same being docketed on the docket of the said Interstate Commerce Commission as docket No. 5574, Sub No. 1, a copy of which petition is annexed hereto, marked "Exhibit A," and is made part hereof.

4. That by the said petition the said The Crew-Levick Company sought to obtain an order from the Interstate Commerce Commission requiring the Pennsylvania Railroad Company, complainant herein,

to furnish to it the said The Crew-Levick Company, tank cars for the transportation in interstate commerce of oil refined at its refinery at Warren.

5. That to the said petition your orator filed an answer before the said Interstate Commerce Commission, denying any obligation on its part under the interstate commerce act, or under the law generally, to furnish vehicles of any specified description, and in particular tank cars, for the transportation in interstate commerce of oil refined by the said The Crew-Levick Company at its refinery at Warren, but averring full performance on its part of all its lawful duties in connection with the furnishing of transportation facilities to the said The Crew-Levick Company. A copy of this answer, marked "Exhibit B," is annexed hereto and is made a part hereof.

6. That thereafter, to wit, on or about the 22d day of October, A. D. 1913, the Pennsylvania Railroad Company, your orator herein, filed with the Interstate Commerce Commission its motion to dismiss the complaint for the reason, as stated in the said motion, that the Interstate Commerce Commission was without jurisdiction to entertain the complaint or to grant the relief prayed for. A copy of the said motion is hereto attached, marked "Exhibit C," and made part hereof.

7. That thereafter, to wit, on or about the 19th day of November, A. D. 1913, a hearing was held before the Interstate Commerce Commission at Buffalo, New York, at which hearing testimony was taken on behalf of the said The Crew-Levick Company, and on behalf of the Pennsylvania Railroad Company, your orator herein. That at the same time, and conjointly with the testimony in the said proceeding, and by agreement between the parties, testimony was taken in a similar proceeding brought against your orator by the Pennsylvania Paraffine Works, the said proceeding being known on the docket of the Interstate Commerce Commission as docket No. 5574.

8. That thereafter, to wit, on the 11th day of March, A. D. 1914, briefs having been filed by both parties to the proceeding brought by the Pennsylvania Paraffine Works against the Pennsylvania Railroad, complainant herein, and to the proceeding brought by the Crew-Levick Company against the Pennsylvania Railroad Company, complainant herein, the two cases were argued before the Interstate Commerce Commission at Washington, D. C., and submitted for decision.

9. That thereafter, to wit, on the 11th day of May, A. D. 1915, the Interstate Commerce Commission made a report and entered an order in the two proceedings above referred to, applicable severally and individually to each one, a copy of which report and order is hereto attached, marked "Exhibit D," and made a part hereof. The order entered by the commission is in the following language, to wit:

"It is ordered, That the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist, on or before August 15, 1915, and thereafter to abstain, from refusing upon reasonable request and reasonable notice therefor to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the act to regulate commerce and amendments thereto.

"It is further ordered, That said defendant be, and it is hereby, notified and required to provide on or before August 15th, 1915, and thereafter to furnish, upon reasonable request and reasonable notice at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

"And it is further ordered, That this order shall continue in force for a period of not less than two years from the date when it shall take effect.

"By the commission.

"GEORGE B. MCGINTY,

"Secretary."

[SEAL.]

10. That the Pennsylvania Railroad Company, complainant
5 herein, is advised by counsel and therefore avers, that neither the act of Congress to regulate commerce commonly known as the interstate commerce act, nor any other law, imposes on the complainant the obligation to supply tank cars for the transportation of petroleum, and that the order of the Interstate Commerce Commission, entered in the proceedings heretofore referred to and quoted above in this petition, is without lawful warrant.

11. That the Pennsylvania Railroad Company, complainant herein, is advised by counsel and therefore avers that neither the act of Congress to regulate commerce, commonly known as the interstate commerce act, nor any other law confers upon the Interstate Commerce Commission authority to make the order referred to and quoted above in this petition.

12. That the Pennsylvania Railroad Company, complainant herein, is advised by counsel and therefore avers that neither the act of Congress commonly known as the interstate commerce act nor any other law authorizes the Interstate Commerce Commission in a proceeding of the character heretofore referred to in this petition as depending before it between the Crew-Levick Company and the Pennsylvania Railroad Company to make the order referred to and quoted above in this petition.

13. That the order of the Interstate Commerce Commission entered in the proceeding heretofore referred to and quoted above in this petition assumed to require your orator to furnish to the said The Crew-Levick Company tank cars for the through transportation of shipments of petroleum in interstate commerce not only when consigned to points on the line of railroad of this complainant but also

when consigned to points on the lines of railroad of other railroad companies; and the Pennsylvania Railroad Company, complainant herein, is advised by counsel and therefore avers that the said order is in this regard without lawful warrant and contrary to the fifth amendment to the Constitution of the United States.

14. That the order of the Interstate Commerce Commission entered in the proceeding heretofore referred to and quoted above in this petition, assumes to require your orator to furnish to the said The Crew-Levick Company tank cars for the through transportation of shipments of petroleum in interstate commerce when such cars happen to be on the railroad of this complainant, whether or not such tank cars are owned by this complainant or by other railroad companies or by private individuals; and the Pennsylvania Railroad Company, complainant herein, is advised by counsel and therefore avers that the said order is in this regard without lawful warrant and is contrary to the provisions of the interstate commerce act; and that obedience thereto on the part of this complainant would subject it to actions for damages on the part of the owners of such cars and to liability in such actions, and that the said order is therefore unlawful and contrary to the provisions of the fifth amendment to the Constitution of the United States.

15. That the order of the Interstate Commerce Commission entered in the proceeding heretofore referred to and quoted above in this petition deprives your orator of its property without due process of law in this, that the time allowed for compliance with the order of the said commission is insufficient to enable this complainant to build tank cars for the transportation in interstate commerce of the shipments of petroleum of the said The Crew-Levick Company and is insufficient to permit it to arrange to acquire such cars or to obtain the use thereof from the present owners thereof on reasonable terms, since such owners are under no compulsion to sell such cars or to rent them to this complainant upon reasonable and just terms. The Pennsylvania Railroad Company, complainant herein, is accordingly advised by counsel and therefore avers that the order of the commission is in this regard without lawful warrant and is in violation of the fifth amendment to the Constitution of the United States.

16. That the Pennsylvania Railroad Company, complainant herein, is advised by counsel and therefore avers that the order of the Interstate Commerce Commission hereinbefore referred to and quoted in this petition is uncertain and indefinite and without warrant in law.

17. That the said unlawful order of the said Interstate Commerce Commission, made and promulgated as aforesaid in the assumed exercise of authority unlawfully claimed by the commission under the said act, will, unless the same be enjoined and set aside, annulled, and suspended by your honorable court, subject your orator to a multiplicity of suits for heavy penalties and a multiplicity of suits for the enforcement of the said order under the provisions of the

said act, and will produce irreparable damage to your orator, the complainant herein.

18. Your orator further shows that if it should be required to comply with the said order, even temporarily, pending final adjudication thereof of its lawfulness, your orator would be without means of reparation for the loss to which it would be thereby unlawfully subjected. In consideration whereof, for as much as your orator is remediless in the premises, at or by the strict rule of common law, and is only relievable in a court of equity where matters of this kind are properly cognizable and reviewable under the act heretofore mentioned, your orator prays that a preliminary or interlocutory order or injunction be entered restraining and suspending the order of the said

Interstate Commerce Commission until the final determination
8 of this cause, and that upon the final hearing of this suit a decree be entered herein enjoining, setting aside, annulling, and suspending the said order of the Interstate Commerce Commission and enjoining the enforcement of the said order.

Your orator further prays that your honors will direct that a copy of this petition be forthwith served by a marshal or deputy marshal in the manner provided in the act of Congress to regulate commerce.

And your orator will ever pray, etc.

*Solicitors and Counsel for the
Pennsylvania Railroad Company.*

9 COMMONWEALTH OF PENNSYLVANIA.

City of Philadelphia, ss:

Before me, the subscriber, a notary public in and for the county of Philadelphia, residing in the city of Philadelphia, personally appeared the undersigned, who, being duly sworn by me according to law, deposes and says that he is vice president of the Pennsylvania Railroad Company, the above complainant, that he has read the said petition, and that the same is true of his own knowledge except such matters as are therein stated on information and belief, and that as to such statements he believes it to be true.

Sworn to and subscribed before me this day of June,
A. D. 1915.

10

EXHIBIT A.

United States of America, Interstate Commerce Commission.

THE CLEW [CREW]-LEVICK COMPANY VS. THE PENNSYLVANIA RAILROAD COMPANY.

Interstate Commerce Commission. Docket No. 5574. Filed Feb. 26, 1913. Sub. No. 1.

The petition of the above-named complainant, the Clew [Crew]-Levick Company, respectfully shows:

(1) That the Clew [Crew]-Levick Company is a business corporation organized, created, and existing under and pursuant to the laws

of the State of Pennsylvania, and as such owns and operates as a part of its business the Glade Oil Works, so called, at or near Warren, in the State of Pennsylvania, and the said Clew [Crew]-Levick Company is and for the several years last past has been engaged in the business of refining oils and the products thereof at its said plant, and your complainant has during all of said time carried on and operated its said business at or near Warren, Pa., as aforesaid, and shipped and delivered the products of said refinery and all transactions hereinafter set forth under the name of the Glade Oil Works, and your complainant has during such time had its office at said refinery for the transaction of business of said Glade Oil Works at or near Warren, Pennsylvania, and during all such time William Muir has been and still is the general manager of the said

11 Glade Oil Works, and said Glade Oil Works refines for shipment about 400,000 gallons of refined oil and gasoline per month and also refines for shipment and transportation about 200,000 gallons of light and dark lubricating oil per month at its said plant and refinery at Warren, aforesaid, and expects to so continue to refine about 400,000 gallons of refined oil and gasoline and about 200,000 gallons of light and dark lubricating oil each and every month during the ensuing year and for each and every year thereafter for shipment and transportation, and that said company in its business of shipping oils and gasolines aforesaid ships and delivers the same at divers points and places throughout the United States, and particularly in the States of Pennsylvania, New York, New Jersey, Ohio, Maryland, Illinois, Indiana, Michigan, and Delaware, as well as the Eastern and Southern States, some or all of them, and said company expects to be during all the ensuing year and for a long time thereafter engaged in interstate commerce business in so selling and delivering said products of said refinery as aforesaid.

(2) That the Pennsylvania Railroad Company is a transportation corporation duly organized and created under and pursuant to the laws of the State of Pennsylvania, and that the said Pennsylvania Railroad Company is and for many years last past has been and still is engaged among other things in transporting freight and passengers by railroad for hire during all said time, and has been and still is a common carrier engaged in transporting freight in the various States of the United States, and as such common carrier during all the times herein mentioned received and delivered freight as a common carrier and is still engaged as such common carrier in receiving and delivering freight for hire throughout the United States in said interstate commerce business as such common carrier, and as such common carrier is subject to the provisions of the act to regulate commerce, approved February 4, 1887, and the acts amendatory thereof and supplementary thereto.

12 (3) Your complainant further shows that said Clew [Crew]-Levick Company maintains switches and sidings in connection with the Pennsylvania Railroad, and that such sidings are connected with the trackage of said Pennsylvania Railroad Company,

and that complainant has ample sidings and switches at and about its said plant at or near Warren, Pa., aforesaid, on which the cars of the said Pennsylvania Railroad can be filled with the products of said refinery, as aforesaid, by running the same into said cars from the tanks of said Clew [Crew]-Levick Company, and said complainant has ample, adequate, and efficient appliances at said Glade Oil Works to fill said cars from said tanks, and that said complainant has ample sidings at its said plant, the Glade Oil Works, for the storage of tank cars for its business, and that the lines and trackage of the said Pennsylvania Railroad Company run from and are maintained from said sidings aforesaid at or near Warren, Pa., through the various States of the United States wherein the said Pennsylvania Railroad Company so operates its lines and trackage aforesaid.

(4) That the Pennsylvania Railroad can by reason of its location and trackage and on account of the location of the customers of complainant, better and more directly serve and deliver the products of your complainant's refinery at or near Warren, Pa., to its said customers than any other transportation company or corporation for the reason that the lines, trackage, and railway of said Pennsylvania Railroad Company run and reach the several points and places where your complainant is requested to and does deliver its oils, gasoline, and the products of its refinery at or near Warren Pa. That with proper and efficient methods and fair service on the part of said railroad company, substantially, all the products of such refinery would and should be transported over the lines of said Pennsylvania Railroad Company.

(5) Your complainant further shows that it is the owner of a considerable number of tank cars, to wit, fifty-seven tank cars, each of which range from 4,500, 6,000, and 8,000 gallons holding capacity, which tank cars are used for the transportation of oils and
13 gasoline so manufactured by your complainant, aforesaid, in bulk. That by the regulations and practice of said Pennsylvania Railroad Company the wear and tear of said cars and the defects and breakage due to defects occurring while in use are repaired by said Pennsylvania Railroad Company at the expense of complainant. That said railroad company by such regulations and practice agreed to make repairs for breakage occurring by rough handling, wrecks, and accidents for which the carrier is directly responsible. That such damage and injury to the cars of your complainant and the amount of such damages are ascertained by the Pennsylvania Railroad Company by the inspectors thereof.

(6) Complainant further alleges that the defendant, the Pennsylvania Railroad Company, has violated the act to regulate commerce of the United States of America and the acts amendatory thereof and supplementary thereto in the following particulars: That the said Pennsylvania Railroad Company upon reasonable request wholly failed and neglected and refused to furnish cars, vehicles, and instrumentalities and facilities for the transportation, carriage,

and shipment in bulk of the products of your complainant in failing and refusing to furnish and provide tank cars, vehicles, and instrumentalities and facilities in connection therewith for the transportation of 400,000 gallons of refined oil and gasoline per month, and to furnish and provide suitable tank cars and vehicles with the necessary and proper instrumentalities and facilities in connection therewith for the transportation in bulk in said tank cars of 200,000 gallons of light and dark lubricating oil during each and every month at its said plant at or near Warren, Pa., aforesaid.

(7) Your complainant further alleges that said Pennsylvania Railroad Company has violated the act to regulate commerce aforesaid in that in the month of November, 1912, your complainant caused notices in words and figures as follows, to wit:

14 "You will please take notice that the Glade Oil Works, of Warren, Pennsylvania, require a sufficient number of tank cars to ship 400,000 gallons of refined oil and gasoline per month, and a sufficient number of tank cars to ship 200,000 gallons of light and dark lubricating oil per month from the plant of said Glade Oil Works at Warren aforesaid during the ensuing year, and that such cars are needed for a proportionate daily shipment from said works during all of said time. And you are hereby notified that said Glade Oil Works demand that said tank cars be so furnished on the siding and switches of said company. Dated November 11, 1912. The Glade Oil Works, by Wm. Muir, manager. To the Pennsylvania Railroad Company."

to be duly and personally served upon R. M. Patterson, of the Pennsylvania Railroad Company, in the city of Philadelphia, in the State of Pennsylvania, and on J. G. Rodgers, the general superintendent of the Buffalo & Allegheny Valley Division of said railroad company, and George B. Beale, superintendent of the Buffalo division of the Buffalo & Allegheny Valley division of said railroad company, also on E. W. Kinander, the agent of the Pennsylvania Railroad Company at Struthers, Pennsylvania, and a similar notice delivered personally to S. C. Long, general manager of the Pennsylvania Railroad Company, at his office in the city of Philadelphia, Pennsylvania.

(8) That your complainant further shows that heretofore, to wit, the 18th day of December, 1912, the said S. C. Long, general manager of the said Pennsylvania Railroad Company, answering the demand and request of your complainant to furnish tank cars as aforesaid and in conformity with said notice, refused to so furnish or increase the tank cars required by your complainant in words and figures as follows, to wit:

"We beg to say that the railroad company is not prepared
15 to increase its present tank-car equipment, but is prepared to transport the commodities in question when properly contained in barrels or other similar retainers at rates that are fair, reasonable, and nondiscriminatory. Yours, truly, S. C. Long, general manager."

(9) Your complainant further shows that said Pennsylvania Railroad Company has during the past several years and now is holding itself out to the public as ready and willing to carry goods and commodities for all persons, indifferently, for hire as such common carrier not only in the State of Pennsylvania but elsewhere throughout the United States of America on its established routes and holds itself out and advertises and it is a part of its business and long has been to transport oils and gasoline such as is produced and refined by your complainant in bulk for hire over its said road.

(10) Your complainant further alleges for the purpose of showing that said defendant is violating the act to regulate commerce that it is necessary that such refined oils and gasoline and light and dark lubricating oils so produced and manufactured at said refinery be transported in tank cars in bulk. That the expense of transporting such products in barrels and by other similar means or in retainers or containers such as is referred to in the letter and correspondence of the general manager of the Pennsylvania Railroad Company increases the expense of said transportation to such an extent that such expense is destructive of the business of shipping said commodities, and that in case the transportation of said oils and gasoline is made in wooden or iron barrels, then such barrels weigh nearly twenty-five per cent of the package when filled, hence adds 25% to the transportation charges. The cost of the package adds on the average in excess of 25% of the value of the commodity contained in it. The cost in time and in handling is greatly in excess of the cost of loading and unloading such commodities in bulk, and leakage and wastage is much greater in barrels and is minimized if transported in tank cars.

16 (11) Your complainant further alleges that the defendant, the Pennsylvania Railroad Company, has further violated the act to regulate commerce as follows, to wit: That the use of tank cars for the transportation of oil and the products of said refinery in bulk has become and now is an actual necessity without which the refiners of crude oil, to wit, your complainant, could not carry on business at a profit. That tank cars have been in use for a period of more than twenty-five years for transporting oils and gasoline and the products of such refining business and have been accepted by the Pennsylvania Railroad Company and by carriers generally when tendered for such transportation, and commercial conditions throughout the country have adjusted themselves to the transportation and delivery of oils and gasoline in bulk. Without the use of such tank cars by your complainant and others similarly engaged in refining crude oil, the cost of such refined products would be largely and vastly increased to the public and users thereof, and that the use of said tank cars has become an actual necessity and are in common use, and the transportation of said oils and gasoline by tank cars of the sizes hereinbefore described has become and is the common, usual, and ordinary method of transportation now in use, and is so recognized and adopted by the Pennsylvania Railroad as well as by

other carriers of said commodities in both their interstate and intrastate and local business, and that the Pennsylvania Railroad Company now owns about 500 tank cars and which it uses in part for the transportation of refined oils and gasoline in its business as such carrier, but that such number of cars and the cars so in use for the transportation of said commodities is wholly inadequate and insufficient for the business of transporting oils and gasoline ordinarily produced, and transported by the Pennsylvania Railroad Company, and by reason of the violation, refusal, and neglect of said Pennsylvania Railroad Company to so furnish tank cars provided

with the usual and ordinary instrumentalities and facilities
 17 for shipment and carriage of oil, it became necessary for the refiners and transporters of oils and gasoline for shipment, and especially of your complainant, to purchase and procure at great expense a large number of tank cars and other vehicles and instrumentalities for the shipment and transportation of their oils and gasoline, although your complainant alleges it is and during all of said times heretofore mentioned was and still is the duty of the said Pennsylvania Railroad Company, as such common carrier so engaged in interstate commerce business, to furnish and provide your complainant and others similarly situated with proper and sufficient tank cars and other vehicles and all instrumentalities and facilities for the shipment of said oils and gasoline so produced and manufactured by your complainant and the whole thereof, but said Pennsylvania Railroad Company has persistently neglected and refused so to do, and by means whereof and on account of said refusal to so furnish said cars, vehicles, and instrumentalities as aforesaid your complainant has suffered great damage, to wit, in the sum of \$50,000.00 therefor.

(12) Your complainant further shows that it requires for the transportation of its products from sixty to one hundred tank cars and upwards per month during the past several years for the transportation of said oil and gasoline as aforesaid, so manufactured and produced by your complainant at its said refinery at or near Warren, Pa., aforesaid, depending upon the capacity of said cars, to wit: One hundred cars of 5,500 gallons capacity or sixty cars of 10,000 gallons capacity, and expects and intends to require a like number of cars during the ensuing year and during a long time thereafter, and your complainant requests and demands of said Pennsylvania Railroad Company to furnish such tank cars in conformity to such needs and requirements, but said Pennsylvania Railroad Company wholly refuses so to do and has continuously and persistently refused so to do during such time and has furnished not to exceed seven cars per month during the past seven months to the great and lasting

18 damage and injury to your complainant. That your complainant is not engaged in the business of a common carrier in transporting freight for hire in either local or interstate commerce, and your complainant was compelled to and did purchase and obtain at great expense a large number of tank cars, to wit: Fifty-seven tank

cars at about \$1,200.00 each, for the transportation of the products of such refinery, and has been on account of such failure and refusal of said Pennsylvania Railroad Company to furnish and provide such cars in sufficient numbers obliged to provide, purchase, and obtain such tank cars to deliver the products of such refinery over said defendant railway company's roads as aforesaid in its own cars and vehicles, and when the said cars have been so shipped and used in the business of so transporting said oils and gasoline as aforesaid, the inspection by the Pennsylvania Railroad Company, as heretofore set forth, has been so expensive and unfair to your complainant that it unnecessarily and largely increased the cost of transportation thereof as hereinafter set forth.

(13) Your complainant further alleges that the defendant, the Pennsylvania Railroad Company, has further violated the act to regulate commerce in that the said railroad company in so transporting the products of said refinery over its said railroad in the cars of your complainant and in returning said cars to complainant; that said cars were damaged, injured, broken, and partially destroyed at divers times during the past several years, and which damage, injury, breakage, and destruction was not due to the ordinary wear and tear of said cars, but was caused and occurred by rough and unusual handling, wrecks, etc., for which said railroad company was directly responsible, yet the said Pennsylvania Railroad Company by its inspection and determination of the damages of your complainant by said railroad company has during all of said time been so uniformly unfair and unreasonably prejudicial to the interests of your complainant during the past several years that said

19 cars of your complainant were broken and greatly damaged by such rough handling, wrecks, and accidents occurring without any act or omission of your complainant, the inspection of such carrier as a general rule was unfairly ascertained and determined, that such damage, breakage, and injury to said cars was in no way attributable to the said Pennsylvania Railroad Company, but was chargeable to your complainant, and that such charges and inspection resulted in the destruction of such tank cars and large expense to your complainant for repairs, to be borne by your complainant and not by the carrier, the Pennsylvania Railroad Company, which largely, unduly, and uniformly increased the cost and expense of transporting the products of such refinery, and that as a result of such unfair and unreasonable inspection and determination by said defendant's inspectors, the cost of the products of your complainant's refinery was unduly and unfairly increased thereby.

(14) Your complainant further charges that the defendant violated the act to regulate commerce in the following particulars, to wit: That the said defendant during the last several years and divers times therein, to wit, several times during each month during all of said time, unduly and unnecessarily delayed the transporting of the tank cars of your complainant in the delivery thereof from the place of shipment at or near Warren, Pa., to the several places

where such cars were to be transported to and unnecessarily and unreasonably delayed the return of said empty cars from the places of delivery of said refined products at or near Warren, Pa., aforesaid, and great delays were occasioned thereby to the damage and detriment of your complainant, and your complainant on account thereof was unable to sufficiently or properly utilize its tank cars for the transportation of its oils and gasoline so refined at its said refinery, and such delay resulted in great injury, detriment, and damage to your complainant, and such delays were also vexatious and

20 inimical to the success of your complainant's business. That by reason and on account of such delay in the transportation of said cars as aforesaid, and by reason of such unfair and unreasonable inspection as aforesaid and said unreasonable and prejudicial determination of the damages so sustained by injury to the cars of your complainant as aforesaid, your complainant has been during the past several years and upwards compelled to ship and transport a part of the products of said refinery by and through other transportation lines by indirect and circuitous routes, to wit, by and over the Dunkirk and Allegheny Valley Railroad Company and also by the New York Central, and which last-named railroad company could not so directly reach or serve the customers of said refinery of your complainant, and the said lines of railways above set forth do not reach or run to the places where your complainant desires to deliver the products of said refinery, and the said railroad companies last above named run through divers other States besides the State of Pennsylvania; but the inspection and adjustment of damages to the tank cars of your complainant was more uniformly and honestly made and the delivery of oils and gasolines more rapidly made by said railroad companies last above named, to wit: The Dunkirk and Allegheny Valley Railroad Company and the New York Central lines, and the tank cars of your complainant were by said last-named companies returned in due time and without any unnecessary delay, with but few exceptions.

(15) Your complainant further alleges that it is the duty and obligation of said Pennsylvania Railroad Company, as such common carrier, as your complainant is informed and believes, to furnish and provide it with suitable, efficient, and ample vehicles, with the necessary instrumentalities and facilities therefor, for the transportation of the products of your complainant's refinery as aforesaid in conformity with the demands so heretofore made to said railroad company to furnish such transportation to it therefor in the amounts hereinbefore set forth and contained in said notices

21 so served on said railroad company, but said railroad company has wholly failed and neglected to perform said duties and obligations so resting upon it under and pursuant to the laws and statutes of the United States, and particularly of the act to regulate commerce and the various sections thereof.

(17) That no previous application has been made for an order or direction requiring the said Pennsylvania Railroad Company to

furnish and provide such vehicles, instrumentalities, and facilities as aforesaid to your complainant.

Wherefore your complainant prays that the defendant may be required to answer the charges herein, and that after due hearing and investigation an order may be made commanding the defendant to cease and desist the said violations of the act to regulate commerce, and that the said defendant shall be required to furnish the necessary transportation pursuant to the prayer of your complainant herein and in conformity to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, and for such other and further order as the commission may deem necessary in the premises, and your petitioner will forever pray, etc.

Dated February 20, 1913.

THE CLEW [CREW]-LEVICK CO.,
By WM. MUIR, *General Manager*.
By GEORGE E. SPRING,
Its Attorney, Office and P. O. Address
at Franklinville, N. Y.

22 STATE OF PENNSYLVANIA,
County of Crawford, city of Titusville, ss:

William Muir, being duly sworn, deposes and says that he is the general manager of the Clew [Crew]-Levick Company named in the foregoing petition subscribed by him; that he knows the contents thereof and the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

WM. MUIR.

Sworn and subscribed before me this 20th day of Feb., 1913.

HARRY GERSON,
Notary Public.

Commission expires Jan. 21, 1917.

23 EXHIBIT B.

Before the Interstate Commerce Commission.

THE CLEW [CREW]-LEVICK COMPANY VS. THE PENNSYLVANIA RAILROAD COMPANY.

Docket No. 5574. Sub-No. 1.

DEFENDANT'S ANSWER.

The above-named defendant, for answer to the complaint filed in this proceeding, respectfully states:

I. This defendant admits that the complainant has been and is engaged in refining oil and the products thereof at or near Warren, Pennsylvania, and that it has shipped and continues to ship its

products in interstate Commerce, but it is without sufficient information to admit or deny the averments of paragraph one as to the volume of the complainant's business and the other averments of this paragraph and accordingly prays that so far as the same be deemed material complainant be required to make due proof thereof.

11. This defendant admits that it is a common carrier engaged in part in interstate commerce, and that as to such commerce it is subject to the act to regulate commerce approved February 4th, 1887, and the acts amendatory thereof and supplementary thereto, so far as the same are constitutional and enforceable.

III. This defendant admits that it has siding connections at Warren, Pennsylvania, with the works of the complainant, but as to whether these sidings are ample for the purpose of the complainant referred to in paragraph three of the complaint, and as to whether the complainant has ample, adequate, and sufficient appliances
24 at its refinery to fill cars from its tanks, this defendant is without sufficient information either to admit or deny, and accordingly prays that so far as those facts may be deemed material complainant may be required to make due proof thereof.

IV. This defendant is not disposed to deny that it can better and more directly serve and deliver the products of the complainant's refinery, than can other transportation companies, but it is unable to make any averment in regard to this allegation of paragraph four of the complaint since it is without information as to the facilities of its competitors, and it is therefore unable to make comparisons. It denies that it has failed to provide proper and efficient methods and fair service, but on the contrary avers that it has performed fully and continues to perform fully its legal duties to the complainant in this regard.

V. This defendant admits that the complainant is the owner of certain tank cars, and that these cars are from time to time transported over the lines of this defendant, but it is without information to enable it to admit or deny the allegations of paragraph five of the complaint with reference to the precise number of these cars, and their respective capacities. Repairs to these cars which become necessary by wear and tear or by defects and breakage are paid for in some instances by the railroad company and in some instances by the complainant, the cause of the necessity for the repairs determining the party responsible for the expenses thereof. The averments of paragraph five of the complaint with reference to the parties responsible for these repairs is not stated with entire precision, but is substantially correct.

VI. This defendant denies that it has wholly failed and neglected and refused to furnish cars to the complainant for the shipments of its products in bulk, and denies further that it has in any regard violated its legal obligations to the complainant in this respect.

VII. This defendant denies that it has violated the act to
25 regulate commerce as alleged in paragraph seven of the complaint, and avers on the contrary that the allegation that it

did so by reason of the service on it by the complainant of certain notices referred to in the said paragraph seven is frivolous and immaterial.

VIII. This defendant admits that its general manager, S. C. Long, under date of December 18th, 1912, wrote the complainant in the manner and form referred to in paragraph eight.

IX. The averments of paragraph nine of the complaint are admitted subject to the qualification of Rule 29 of the official classification No. 39, a portion of which reads as follows:

"In providing ratings in this classification for articles in tank cars, the carriers whose tariffs are covered by this classification do not assume any obligation to furnish tank cars."

X. This defendant denies that it is violating the act to regulate commerce as alleged in paragraph ten of the complaint. With regard to the remaining averments of paragraph ten, it is without sufficient information to enable it to admit or deny the same and accordingly prays that due proof thereof be made by the complainant.

XI. This defendant admits that it owns approximately five hundred tank cars, but it denies that it is under any obligation to increase this class of its equipment, or that it has failed in its legal duties under the act to regulate commerce. It denies that it has failed to furnish adequate facilities as required by the act to regulate commerce, but on the contrary avers that it has fully performed its legal duties in this regard. It denies that the complainant is entitled to recover any damages from it on account of the matters alleged in this complaint. With respect to the other averments contained in paragraph eleven of the complaint, this defendant is without sufficient information to enable it either to admit or deny the same, and accordingly prays that so far as the same be deemed material due proof thereof be required.

26 XII. This defendant is without sufficient information to enable it either to admit or deny the extent of the volume of the complainant's business as alleged in paragraph 12 of the complaint. It denies that it has failed to furnish adequate facilities for the transportation of such portion of the complainant's traffic as has been duly offered to it for transportation. This defendant denies further that the complainant was compelled to purchase any tank car equipment because of any failure on the part of it, the defendant, to fully perform its legal duty under the act to regulate commerce. It denies further that the inspection established by it, The Pennsylvania Railroad Company, has been so expensive or unfair to the complainant as unnecessarily to increase the cost of transportation to the complainant.

XIII. This defendant denies that it has unfairly inspected the cars owned by the complainant and denies further that it has made unfair charges for the repairs necessary thereto. It denies further that there has been any unlawful action on its part which has unduly increased the cost of transportation to the complainant.

XIV. This defendant denies that it unreasonably or unduly delayed the transportation of the complainant's shipments, and denies further that it has subjected them or does subject them to any unfair or unreasonable inspection, or imposes upon the complainant any unjust charges for necessary repairs. It is without information as to the shipments alleged to have been made by the complainant over the Dunkirk & Allegheny Valley Railroad Company and also over the New York Central & Hudson River Railroad Company, and consequently it is unable to admit or deny the averments of the complaint with respect to the transportation service of these two companies. It accordingly prays that if these allegations be deemed material, due proof thereof be required.

XV. This defendant denies that it has failed to comply with the obligations imposed upon it by the interstate commerce act, 27 with respect to the furnishing of adequate facilities for the transportation of interstate freight, but on the contrary avers that it has fully performed its duties in the premises.

Wherefore this defendant prays that the complaint filed in this proceeding be dismissed.

(Signed) THE PENNSYLVANIA RAILROAD COMPANY,
By C. M. SHEAFFER,
General Superintendent of Transportation.

HENRY WOLF BIKLÉ,
GEORGE STUART PATTERSON,
Of Counsel.

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EXHIBIT C.

Before the Interstate Commerce Commission.

THE CLEW [CREW]-LEVICK COMPANY VS. THE PENNSYLVANIA RAILROAD COMPANY.

Docket 5574. Sub No. 1.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

Comes now the Pennsylvania Railroad Company, the defendant above named, and respectfully moves the Interstate Commerce Commission to dismiss the complaint filed in this proceeding for the following reason:

The Interstate Commerce Commission is without jurisdiction to entertain this complaint or to grant the relief prayed for.

(Signed) HENRY WOLF BIKLÉ,

Attorney for the Pennsylvania Railroad Company.

PHILADELPHIA, PA., October 20th, 1913.

EXHIBIT D.

INTERSTATE COMMERCE COMMISSION.

No. 5574. Pennsylvania Paraffine Works v. Pennsylvania Railroad Company.

No. 5574 (Sub-No. 1). Crew-Levick Company v. Same.

Submitted March 11, 1914. Decided May 11, 1915.

1. This commission has the power to require carriers to furnish all necessary equipment, both ordinary and special, upon reasonable request. *Vulcan Coal & Mining Co. v. I. C. R. R. Co.*, 33 I. C. C., 52.
2. The question of what is a reasonably adequate car supply is an administrative one of which this commission alone can take original jurisdiction.
3. A shipper's request for cars especially suited for the transportation of his products would not be reasonable if the cars must be prepared for shipment in a manner which is peculiarly within the technical knowledge of men connected with that industry, or if the movement of the commodity is a dangerous operation which can be safely performed only by men engaged in its production.
4. The shipment of petroleum products in tank cars does not call for such technical knowledge as would render unreasonable complainants' request that defendant furnish these cars.
5. From the standpoint of economy to the shipper, to the consumer, and the railroad, tank cars are the only proper cars to use in the shipment of petroleum.
6. One of the tests to be relied upon in determining the reasonableness of a shipper's request for cars is to be found in the volume of his shipments in the past, due allowance being made for the growth of his business.
7. All cars used by carriers, whether they be owned by the carriers themselves or leased from private car lines or from shippers, must be distributed without discrimination.
8. Whatever transportation service or facility the law requires a carrier to supply, it has a right to furnish. *Atchison Ry. Co. v. U. S.*, 232 U. S., 199; *Arlington Heights Fruit Exchange v. S. P. Co.*, 20 I. C. C., 106.
9. Defendant required to furnish a sufficient number of tank cars.

G. E. Spring and C. D. Chamberlin for complainants.

Henry Wolf Biklé for Pennsylvania Railroad Company.

REPORT OF THE COMMISSION.

MEYER, *Commissioner*:

These complaints, which are identical, are brought against the single defendant, the Pennsylvania Railroad Company. They 30 allege that the defendant has refused to furnish tank cars upon the reasonable request of complainants, in violation of the act to regulate commerce. They also allege that complainants have been damaged by unreasonable delays in the return empty of complainants' privately owned tank cars, and by defendant's unfair determination of damages to such cars, outside of ordinary wear and tear. Complainants pray for an order requiring defendant to furnish cars, and for such further order as the commission may deem necessary.

Complainants are refiners of crude oil. The Pennsylvania Paraffine Works has its office and refinery at Titusville, Pa., and the Crew-Levick Company operates the Glade Oil Works at Warren, Pa. Both complainants are corporations, organized under the laws of Pennsylvania, and have been engaged in refining oil for over 20 years. For the past two years the Pennsylvania Paraffine Works has been refining about 20,000 barrels of crude oil per month and the Glade Oil Works from 15,000 to 16,000 barrels per month. During the 10 months of 1913 for which results are shown in tables submitted by complainants the shipments of the Pennsylvania Paraffine Works averaged over 750,000 gallons and the shipments of the Glade Oil Works over 500,000 gallons per month. Of the shipments made by the Pennsylvania Paraffine Works 91 per cent moved in tank cars, $1\frac{1}{2}$ per cent in barrels loaded in cars other than tank cars, and $7\frac{1}{2}$ per cent in pipe lines, while of the shipments made by the Glade Oil Works 86.8 per cent moved in tank cars, 4.7 per cent in barrels, and 8.5 per cent in pipe lines.

Approximately 250,000,000 barrels of crude oil are produced annually in the United States, and there are in the neighborhood of 100 companies engaged in refining oil. For a long time the bulk of the refined product has been shipped in tank cars, and at present 91 per cent of the refined oil produced in this country is transported in this manner. It was testified that defendant has been using such cars for the shipment of oil for over 25 years.

Complainants have ample sidings and connections with defendant's railway both at Titusville and at Warren for the delivery by defendant and the loading of tank cars. The tank cars now in common use for the transportation of oil have a capacity of from 6,000 to 12,000 gallons each. The cars are so constructed that they may be rapidly loaded at the refinery, and jobbers and dealers in the refined product throughout the country have the proper and necessary facilities for unloading tank cars by gravity at their various stations. Even the country grocer has his tank, which is filled from tank wagons. The tank wagons are filled from the oil dealer's storage tank, which in turn is filled from tank cars.

The only other method of transporting oil by rail is in barrels or similar containers loaded in box cars. However, the cost to the purchaser of oil transported in barrels is from $3\frac{1}{2}$ to $3\frac{3}{4}$ cents per gallon above the cost when transported in tank cars. This higher cost is due to the additional weight upon which freight charges must be paid, depreciation in value of the barrels when used, greater waste than when transported in tank cars, and additional expense of handling and delivering. The freight charges alone, it was testified, are increased approximately 25 per cent by the added weight of the barrel. The price of lubricating oil is from $2\frac{1}{2}$ to 22 cents per gallon f. o. b. cars at complainants' works; that of burning oil from $4\frac{1}{2}$ to $5\frac{1}{4}$ cents per gallon, and of gasoline from $9\frac{1}{2}$ to $17\frac{1}{2}$ cents. It is evident that the addition of $3\frac{1}{2}$ cents per gallon to the cost of oil when transported in barrels makes that method of transportation prohibitive and that the refusal of the railroads to furnish an adequate supply of tank cars would tend to drive out of business refiners who are unable to supply themselves with enough tank cars to move their products. Even witnesses who appeared in defendant's behalf admitted that tank cars are an absolute necessity for the transportation of refined products, and that their use effects an economic gain. Moreover, shippers are required to pay freight on the full shell capacity of tank cars, and the carload revenue derived from the movement of products in tank cars compares favorably with the revenue derived from movements in other cars. The transportation of oil in tank cars is desirable also from a purely transportation standpoint.

The bulk of the movement of refined oil is in tank cars owned by the shippers. In 1887 the Pennsylvania Railroad acquired 1,308 tank cars, some of which have subsequently been sold to independent refineries. Defendant now owns 499 tank cars, all that remain of those purchased in 1887 and 482 of which are furnished to shippers of oil located on its lines. The other railroads east of the Mississippi River own, in the aggregate, only 303 tank cars. The privately owned tank cars east of the Mississippi aggregate about 27,700, and the total number of tank cars owned in the United States was given as approximately 40,000.

At present the Pennsylvania Paraffine Company owns 54 tank cars and the Crew-Levick Company 57 tank cars. Complainants allege that these cars, together with the cars furnished by defendant, are not sufficient to meet the requirements of their business. It was testified that during the past five or six years complainants have made daily inquiry for the delivery of cars to their refineries and that a formal order for cars has constantly been on file in defendant's offices at Titusville and at Warren. On March 9, 1910, in a letter to defendant's superintendent at Buffalo, the Pennsylvania Paraffine Company demanded that in the future defendant furnish the necessary tank cars for the transportation of complainants' product.

32 On March 30 the defendant's superintendent replied that complainants' request for tank cars actually needed for intended

shipments would receive due consideration, and would be complied with to such extent as the tank-car equipment of the company would permit. In fact, however, defendant did not comply with complainants' request further than to furnish cars in about the same proportion as before. Subsequent to making this request the Pennsylvania Paraffine Company purchased five and the Crew-Levick Company two additional tank cars, the former as late as September, 1913. On November 11, 1912, shortly prior to bringing this complaint, each complainant served defendant with a formal notice requesting it to furnish a sufficient number of tank cars to ship, respectively, 450,000 gallons of oil per month from the Pennsylvania Paraffine Company's refinery at Titusville and 600,000 gallons per month from the Glade Oil Works at Warren. To this request defendant's answer, through its general manager, was as follows:

"We beg to say that the railroad company is not prepared to increase its present tank-car equipment, but is prepared to transport the commodity, when properly contained in barrels or other similar containers, at rates that are fair and reasonable and nondiscriminatory."

Thereafter complainants brought this action.

Complainants' customers are in the main located in official classification territory. Complainants assert that defendant's line is the most direct route to nearly all of the destinations to which they are accustomed to ship, and that with fair service on defendant's part substantially all of the products of complainants' refineries would be transported over its line.

Complainants have of late been making a large part of their shipments over the Dunkirk, Allegheny Valley & Pittsburgh Railroad and the New York Central Lines, although these carriers have no tank cars of their own and their lines form, in many instances, a much more circuitous route than the lines of the Pennsylvania Railroad. Complainants give as their reason for preferring the indirect route of the New York Central Lines unfair settlement by the Pennsylvania of damages to complainants' private cars, frequent and unnecessary delay in delivering their shipments and returning empties, and the failure of defendant to report the location of complainants' cars. As regards the last point, the testimony shows that defendant is now giving the service desired, but as a result of the others complainants allege that they have suffered great pecuniary loss. It is stated that the service of the New York Central Lines is much better in these respects. Complainants allege that the private ownership of cars by shippers is bound to result in the unfair and unjust determination of damages to shippers' cars occasioned by rough usage, wrecks, and accidents which by the master car builders' rules should be borne by the railroad, and in long and unnecessary delays in the return of empties.

Complainants state further that the cost of maintaining their privately owned tank cars far exceeds the rentals received from the railroads. They are also required in some States to pay taxes upon

the cars they own. These expenses would not fall upon the shipper if the railroads were required to furnish the necessary cars. Complainants state that the reason they originally provided themselves with tank cars of their own was that at that time the railroads could not be compelled to furnish this equipment, but that now, under the amended law, this duty has been specifically declared, and this commission has been given the power to enforce it.

While complainants' prayer is that defendant be required to furnish all the equipment needed for the transportation of their products, they allege that even if their own cars be taken into consideration the additional equipment has not been sufficient to meet the requirements of their business.

Defendant emphatically denies this to have been the case and contends that in the past three years it has furnished complainants with all the tank cars to which they were entitled. While exhibits introduced in evidence indicate that during the past few years defendant has supplied practically all the cars ordered by complainants, there have at times been long delays in filling the orders. The most extreme example of delay was in the case of an order of the Pennsylvania Paraffine Company for 15 tank cars on October 2, 1912, which was filled by the delivery of one car on each of the following dates: October 4, 5, 8, 14, 15, and 16, 1912; November 4, 5, and 12, 1912; December 10, 21, and 31, 1912; January 16, 1913; and March 10 and 11, 1913. A delay of over five months in filling an order for cars obviously shows that at least during that time defendant's equipment did not meet the reasonable demands of complainants. The evidence shows orders for cars to have frequently been given in excess of complainants' immediate needs, in expectation that defendant would fill them as rapidly as possible in the ordinary course of its business. Defendant also showed that tank cars furnished complainants have at times been refused, although it does not appear that such refusal was always made because complainants at the time had no further shipments to make. Although the testimony does not show that the tank cars furnished by defendant plus complainants' privately owned cars have at all times been insufficient to meet the requirements of complainants' business, it can nevertheless be safely stated that at times this has been the case.

It is plain that the cars furnished by defendant constitute but a small proportion of those required for the transportation of complainants' products. During the 12 months from November,

34 1912, to October, 1913, inclusive, the Pennsylvania Paraffine Company shipped in all 1,161 carloads of refined products, of which 821 were shipped over the New York Central lines and 340 over the Pennsylvania Railroad. Of the total 998 carloads an average of $83\frac{1}{4}$ carloads per month was shipped in complainants' private cars, and 163 carloads, an average of $13\frac{7}{12}$ per month, in tank cars furnished by the Pennsylvania Railroad. During the same period the Glade Oil Works shipped 992 carloads, 535 over the New York Central lines and 457 over the Pennsylvania Railroad. Of

these, 844 carloads, or an average of 70½ per month, were shipped in tank cars belonging to the Crew-Levick Company, and 148 carloads, an average of 12½ per month, in Pennsylvania Railroad Company cars. It is obvious that if defendant is excused from its obligation to provide the equipment necessary to move complainants' products by reason of complainants having in the past provided cars of their own, complainants would always be compelled to supply whatever additional cars were from time to time needed to take care of increases in their business, even though complainants no longer desired to maintain cars of their own. Defendant has refused to increase its supply of tank cars. The question to be decided is not whether the cars supplied by defendant together with those owned by complainants are sufficient to meet complainants' demands, but rather whether complainants may retire from the business of furnishing tank cars for the transportation of oil and henceforth rely entirely upon the railroads to provide this equipment, or whether complainants must in the future continue to take care of the increasing demands of their business by buying additional tank cars.

Defendant argues that the act to regulate commerce neither imposes upon carriers the obligation to buy additional tank cars nor invests the commission with power to require the purchase of additional tank cars.

For the jurisdiction of the commission over the present controversy, complainants rely upon the following portions of the act to regulate commerce as amended in 1906 and 1910. Section 1 of the act provides that—

"* * * the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor. * * *"

Section 12 of the act provides:

"* * * the commission is hereby authorized and required to execute and enforce the provisions of this act * * *"

and section 15 provides:

35 "That whenever, after full hearing upon a complaint made as provided in section 13 of this act, or after full hearing under an order for investigation and hearing made by the commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this act, or that any individual or joint classi-

fications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

The provisions of section 1 quoted above were inserted by the amendment of 1906; those of section 12 were added by the amendment of 1889; and section 15 was given its present form by the amendment of 1910, having previously been amended in 1906. Attention is called to these amendments because under the act, as originally passed, the commission did not have jurisdiction to require carriers to provide proper and adequate car equipment. *Scofield v. L. S. & M. S. Ry. Co.*, 2 I. C. C., 67; *Rice v. C. W. & B. Ry. Co.*, 3 I. C. C., 193; *Re Transportation, etc., of Fruit*, 10 I. C. C., 360.

The question of the commission's jurisdiction under the amended law was not brought before us until very recently. In *Vulcan Coal & Mining Co. v. I. C. R. R. Co.*, 33 I. C. C., 52, we were asked to award damages due to a carrier's alleged failure to supply cars to certain coal mines upon reasonable request. The defendant in that case also denied the commission's jurisdiction. We held that the question presented was properly before us on the ground that the determination of damages necessitated the prior determination of the extent to which defendant failed to comply with the duty it owed complainants to furnish cars upon reasonable request therefor, which we held to be an administrative question of which this commission alone can take original jurisdiction.

Defendant's first argument is that it was not the intention of Congress in passing the act to regulate commerce and amendments thereto to forbid the operation of private car lines or the ownership of cars by shippers.

36 Defendant first calls attention to the fact that at the time of the consideration of this amendment, the private ownership of railroad cars, including tank cars used in the transportation of oil, had continued for many years and was well known to the public, to the commission, and to Congress. Moreover, in the hearings held during 1905 and 1906 with reference to the proposed amendments to the act, this subject was brought to the direct attention of the Senate Committee on Interstate Commerce by many witnesses. Many cases

of discrimination and rebates of that time occurred in connection with private car lines, and some shippers went so far as to demand that the act be so amended as to "forbid all carriers hauling cars carrying freight of any and every description that are not owned and controlled by such carriers themselves or by other carriers, bona fide such, and not created or existing for any other purpose."

After quoting several excerpts from the debates in Congress on the amendment of 1906, defendant argues that if Congress had intended to require the railroads to take over the privately owned cars or to confer upon the commission power to promulgate such a requirement it is inconceivable that the long debate on this amendment should disclose no intimation of this purpose. The following quotation from defendant's brief clearly shows the position taken:

"In view of the prevalence of the private ownership of cars, and in the light of the foregoing evidence with reference to the proceedings before the Senate committee and in Congress, it is impossible to believe that the Hepburn amendment was intended to change the degree of the obligation of the carriers with respect to furnishing the equipment for the transportation of commodities which were partly or largely transported in privately owned cars of a special description. Certainly, if the Congress of the United States had intended any change of such profound magnitude (and had intended to endow the commission with a power which the commission had already decided it did not have, the provisions to this end would have been much more specific and definite than the provisions on which the complainants rely."

Defendant's argument is based upon the supposition that the interpretation which complainants seek to place upon the provisions of the act under discussion, by which the jurisdiction of the commission in the present case is sought to be upheld, would require the railroads to take over the privately owned cars or confer upon the commission power to promulgate such a requirement. This, however, would not necessarily be the case. Section 1 of the act provides that it shall be the duty of every carrier subject to the provisions of the act "to provide and furnish" transportation, including cars, upon reasonable request therefor. This does not require the carriers' ownership of cars, but places upon them the duty to provide cars, which may be cars of their own or cars which they have secured in some other manner. The carriers, subject to the act, are to obtain and

37 have ready for future use "all cars and other vehicles and all instrumentalities and facilities of shipment or carriage," and furnish the same upon reasonable request. The power of the commission to require the carriers to comply with their duty is subject only to the proviso that the request for "cars and other vehicles" and the "instrumentalities" and "facilities" of transportation shall be reasonable. Whether or not a particular request is reasonable is a matter for this commission to decide in each particular case.

Defendant calls attention to a provision of its charter whereby it is required to permit its rails to be used as a public highway for the

movement of privately owned cars. *Boyle v. P. & R. Ry. Co.*, 54 Pa., 310; *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I. C. C., 356. In the light of what has been said above, it is evident that this provision of defendant's charter in no way conflicts with granting the relief prayed for.

It is further argued by the defendant that the requirement of section 1 to furnish transportation upon reasonable request was intended to transmute into an obligation under Federal law the common-law obligation of the carrier in this regard, and it is stated that there never was an obligation at the common law to supply a vehicle of a particular form or description when such form or description had no reference to the safety of transportation. Defendant states that so long as there is no unreasonableness or discrimination in the rates and so long as the carrier's equipment is adapted to the safe transportation of the goods intrusted to it, there is nothing in section 1 which in any way restricts the right of the carrier to choose and select the vehicle of transportation which it regards most satisfactory for the conduct of its business.

As bearing upon this point, it should first be stated that defendant holds itself out to transport oil in bulk. It not only publishes rates for the transportation of oil in tank cars but owns tank cars and supplies shippers with them. It leases cars owned by companies engaged in refining oil and transports their products in those cars at the rates it publishes for the movement by rail of oil in tank cars. It certainly can not be contended that the transportation by rail of oil in bulk could be attempted safely in any equipment other than tank cars.

Whatever the obligation of the carriers may have been under the common law, the requirements of the act are plainly more comprehensive than defendant contends. It is, of course, plain that the extent of defendant's obligation at common law is not determinative of its extent under the statute.

However, in further support of its argument that the requirements of section 1 to furnish transportation upon reasonable request were merely intended to transmute into an obligation under

38 Federal law the common-law obligation of the carrier, defendant calls attention to the safety appliance acts, which it is stated indicate that when Congress contemplates the imposition of obligations with respect to the equipment of carriers it covers the subject by careful specific rules. Defendant argues that if it had been the intention of Congress to endow the commission with the power to require the purchase of equipment of specialized character Congress would have defined the manner in which and the extent to which this power might be exercised. Attention is also called to the commission's recommendation, in its last report to Congress, that carriers be required to furnish steel coaches for passenger traffic, and it is argued that this is an admission of its lack of jurisdiction over matters concerning a carrier's equipment. If the commission can require carriers to furnish tank cars for the movement of oil, de-

fendant contends, it certainly must have jurisdiction to require them to furnish steel passenger coaches.

The attempted analogy does not exist. The power to require proper and adequate cars for the transportation of passengers, or of oil in bulk, is one thing. The power to require that such cars be of peculiar or especial design, pattern, or material is quite another thing. At common law shippers had a present remedy in the courts by suit for damages in case of a carrier's failure to perform its duty to transport safely. One of the conditions, however, which led to the passage of the act to regulate commerce and of the amendments thereto was the inability of shippers to find a present remedy in the case of rates charged for transportation of goods or regulations or practices affecting such transportation which were unjust, unreasonable, or discriminatory. And, as clearly appears from a reading of the provisions which were added by the amendment of 1906, to which reference has been made above, Congress at that time had in mind giving shippers a more adequate remedy in case the facilities for transportation were inadequate.

It is further contended by defendant that even if the act to regulate commerce declares the duty of carriers to provide special equipment it does not invest this commission with power to require the purchase of additional cars. It is stated that while the commission is charged with the enforcement of the act to regulate commerce its powers in cases coming up for decision after hearing on complaints, as provided in section 13, are fully defined in sections 15 and 16, which authorize the commission—

“ * * * to determine and prescribe * * * the just and reasonable * * * rate or rates * * * to be thereafter observed * * * and what * * * regulation or practice is just, fair, and reasonable to be thereafter followed, and to make an order that the carrier or carriers shall * * * conform to and observe the regulation or practice so prescribed.”

39 Defendant contends that the present case involves no rate, regulation, or practice, arguing that if it be a practice within the meaning of the act for the carrier to furnish only 500 tank cars, it could be contended with equal reason that every detail of railroad operation is a practice within the meaning of the act. Practice, it is contended, connotes a continued method of operation and not merely a single act.

While the act does not specify that this commission should regulate every detail of railroad operation, we are required by its terms to determine whether any rate or any regulation or practice affecting transportation is just, reasonable, and nondiscriminatory. Among other things we are required to decide whether or not in specific cases carriers have complied with the requirements of the act to furnish adequate facilities upon reasonable request. In *Rail & River Coal Co. v. B. & O. R. R. Co.*, 14 I. C. C., 86, the commission said:

“ * * * the words ‘any regulations or practices whatsoever * * * affecting such rates’ are used synonymously with the words

'regulation or practice in respect to such transportation;' and * * * both clauses are to be read in the widest possible sense and embrace all regulations and practices of carriers under which they offer their services to the shipping public and conduct their transportation * * *."

In *Mobile Chamber of Commerce v. M. & O. R. R. Co.*, 23 I. C. C., 417, after calling attention to the provisions of section 1, including the requirement that carriers shall furnish cars upon reasonable request therefor, the commission said:

"* * * Under section 15 as amended in 1910 the commission is empowered to determine and prescribe what will be the just, fair, and reasonable regulation or practice which shall be thereafter followed by the carrier as to the services which the carrier is required to give under section 1."

In *Arlington Heights Fruit Exchange v. S. P. Co.*, 20 I. C. C., 106, after calling attention to the relative advantages of precooling and standard refrigeration in the movement of citrus fruits from California to eastern markets, the commission said:

"Oranges can not be moved in box cars without ventilation. Let us assume that the ventilated car had been unknown and that the entire citrus-fruit crop had moved at all seasons of the year under refrigeration. It is discovered that by the use of a car so constructed that a current of air can be forced through the oranges by the motion of the car, two-thirds of the citrus-fruit crop can be transported without the expense of refrigeration. Could the defendants under these circumstances insist that all oranges should continue to move under refrigeration and would they rest under no obligation to provide ventilated cars?"

"* * * This vast tonnage should be handled in the most economical and satisfactory manner, and these carriers should furnish for that movement such cars as will effectuate that purpose. They have a right to insist upon a proper compensation for supplying that equipment, but they have no right to say that old methods must continue in use and new methods held in abeyance rather than change the form of their cars."

40 "The carrier may insist upon furnishing all the equipment which is needed for the movement of precooled shipments and might decline to use equipment furnished by the shippers, but it can not refuse to furnish proper equipment upon fair terms; * * *"

The carriers who were defendants in this case petitioned the Commerce Court to annul and set aside the commission's order. The Commerce Court approved the findings of the commission and dismissed the complaint, whereupon the case was appealed to the United States Supreme Court, which held, *Atchison Ry. Co. v. U. S.*, 232 U. S., 199:

"Whatever transportation service or facility the law requires the carrier to supply they have the right to furnish. They can therefore use their own cars, and can not be compelled to accept those tendered

by the shipper on condition that a lower freight rate be charged. So, too, they can furnish all the ice needed in refrigeration, for this is not only a duty and a right, under the Hepburn Act, but an economic necessity due to the fact that the carriers can not be expected to prepare to meet the demand, and then let the use of their plants depend upon haphazard calls, under which refrigeration can be demanded by all shippers at one time and by only a few at another."

And at page 217:

"Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay. The interest of the public is to be considered as well as that of shippers and carriers * * *."

In *C. & P. Ry. Co. v. Hardwick Elevator Co.*, 226 U. S., 426, after referring to the provisions of section 1 of the act requiring carriers to furnish cars upon reasonable request, the United States Supreme Court said:

"Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty. * * *"

Attention should also be called to the following language used by the Commerce Court in *United States v. L. & N. R. R. Co.*, 195 Fed., 88:

"This court has no jurisdiction to consider the question of car distribution in advance of some action by the Interstate Commerce Commission or to determine how many cars the Southern Railway shall furnish or how many the Louisville & Nashville Railroad shall furnish for the transportation of the petitioners' coal. It is believed, however, that this court has the undoubted jurisdiction upon the facts presented by the record to issue a writ or writs of mandamus directed to these common carriers, commanding them that, so long as they establish and maintain through routes and joint rates to southeastern territory, they shall move and transport in interstate commerce the coals of the petitioners when tendered in such reasonable quantities as may be determined either by agreement with the carriers or by the Interstate Commerce Commission if they can not agree."

The United States Supreme Court has repeatedly stated that the whole scope of the act to regulate commerce shows it to have been intended that this commission and not the courts shall pass upon administrative questions. *T. & P. Ry. Co. v. Abilene Cotton*
41 *Oil Co.*, 204 U. S., 426; *B. & O. R. R. Co. v. Pitcairn Coal Co.*,
215 U. S., 481; *Robinson v. B. & O. R. R. Co.*, 222 U. S., 506;
United States v. Pacific & Artic Co., 228 U. S., 87; *P. R. R. Co. v.*
International Coal Mining Co., 230 U. S., 184; *Mitchell Coal & Coke*
Co. v. P. R. R. Co., 230 U. S., 247; *Morrisdale Coal Co. v. P. R. R.*
Co., 230 U. S., 304; *S. Ry. Co. v. Reid*, 222 U. S., 424; all of which

are quoted from at length in *Vulcan Coal & Mining Co. v. I. C. R. R. Co.*, supra.

In *T. & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S., 426, 440, 441, it is stated that if, under the act to regulate commerce, the courts were given jurisdiction to determine the reasonableness of rates, the result would be as follows:

"* * * if, without previous action by the commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted."

Can it be doubted that if the courts were required to state what demands for cars are reasonable and when a carrier's equipment is adequate a similar lack of uniformity and like confusion would result?

In *Vulcan Coal & Mining Co. v. I. C. R. R. Co.*, supra, we said:

"Furthermore, one can not escape the conclusion that the question as to the extent to which defendant failed to comply with the duty it owed complainants to furnish cars upon reasonable request therefor is an administrative one of which the commission alone can take original jurisdiction. This must be true unless it be the carrier's absolute duty to furnish cars at all times to the full extent of the shipper's demands. Only then would this complaint present a question like that considered in *P. R. R. Co. v. International Coal Co.*, supra. It may be that after the determination by the commission of the number of cars which the defendant should have furnished and of the times when it should have furnished them the courts would have concurrent jurisdiction with the commission of the ascertainment of the damages suffered by complainants by reason of defendant's failure to perform that duty. However, it is not a carrier's duty to furnish all cars demanded at all times. In substance section 1 provides that upon reasonable request it shall be the duty of every carrier to furnish cars. By virtue of these requirements it becomes the carrier's duty to maintain a reasonably adequate car supply, and the question of what is a reasonably adequate car supply is just as much an administrative one as the question of what is a reasonable rate. The

legal sufficiency of defendant's car supply can not be definitely fixed by the statute. It is a question which, using the language of the court in the Mitchell case, 'involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of' this tribunal."

42 One further argument advanced by defendant should be considered in connection with the question of jurisdiction. Defendant states that to require the carrier to purchase additional equipment may involve a demand that the carrier increase its capital account, and the power of the commission can only properly be determined by a consideration of its right to require such action on the part of the railroads. But such an objection is not sound, because the question of the financial ability of any carrier would be a matter for consideration in judging of the reasonableness of the request for special or additional equipment and would be one of the matters considered by the commission in judging the particular case when the same arises.

The jurisdictional question disposed of, we will now turn our attention to the defendant's contention that even if the act to regulate commerce should be held to invest this commission with power to require carriers to purchase additional cars, the evidence in this proceeding does not justify the commission in exercising this power.

It is contended that the circumstances attending the transportation of commodities in tank cars are so peculiar as to constitute this a class of equipment which should be furnished by the shippers themselves. Private ownership of tank cars prevails, particularly east of the Mississippi River. While it is recognized that the volume of shipments of petroleum is greater than the volume of shipments of any other liquid commodity, it is pointed out that there are numerous other liquid commodities transported in tank cars. Forty-four are enumerated in an exhibit. Some of the tank cars used for the transportation of these commodities are of very special construction. *Albree v. B. & M. R. R.*, 22 I. C. C., 303. The same car can not be used for different liquid products without thorough cleaning, and as a consequence each car must be practically confined to the use of one commodity. While the shipper of a single commodity can familiarize himself and his employees with the risks peculiar to the handling of that particular commodity, the carrier would be under the necessity of acquainting its employees with all the possible difficulties and dangers of all liquid commodities transported. Even the tank cars now devoted to the petroleum trade must be divided into classes and their use restricted to the refined, light lubricating, and heavy lubricating classes. The demand for tank cars amounts in substance to a demand not only for the vehicle but also for the package, and relieves the shippers of the expense of packing which they may properly be called on to bear.

Finally, attention is called to the fact that the Pennsylvania Railroad owns more tank cars than are owned by all the other carriers operating east of the Mississippi. Defendant states that if

43 the other railroads would furnish cars in the same proportion the supply would be sufficient to meet all requirements, but that complainants' demand would practically require the Pennsylvania Railroad to furnish equipment available for use by all the railroads in this territory.

While it must be recognized that for the shipment of some of the products which now move to a certain extent in tank cars it would not be reasonable to require carriers to furnish tank cars, we do not believe this to be the case in the movement of the products of petroleum. In many industries a few tank cars will suffice to move the products of the industry. In other cases the tank cars must be prepared for shipment in a manner which is peculiarly within the technical knowledge of the men connected with that industry, or the handling of the commodity is a dangerous operation which can be safely performed only by men engaged in its production. In the latter case a shipper's request for cars peculiarly suited for the transportation of his products would not be a reasonable one, and in such cases carriers should publish rates for the transportation of the privately owned tank cars filled with these products and not, as in the case of oil, for the transportation of the product in tank cars. The railroad would not then hold itself out to transport the commodity in any other way than in tank cars offered by the shipper, and no obligation would rest upon it to furnish these cars. In such cases the shipper should receive no rental for the use of the car.

The record does not show such technical knowledge to be needed in the shipment of petroleum products in tank cars as to render unreasonable complainants' request to furnish cars. The fact that the defendant has for more than 20 years past been furnishing tank cars for the shipment of oil bears witness to the contrary. We see no particular hardship to defendant arising out of the necessity of allowing its equipment to move beyond its lines. Further, the necessity of defendant's purchasing a large number of additional tank cars does not follow from our holding in the present case. The requirement of the act is that defendant provide and furnish, not necessarily buy, a reasonably adequate supply of cars, and the 13,000 and more tank cars owned by independent car lines are available to defendant as well as to shippers. Defendant's brief contains the suggestion that perhaps the solution will be to have private companies furnish cars of special types. That is a solution of which the carriers can avail themselves if they so desire. Moreover, all cars used by carriers, whether they be owned by the carriers themselves or leased from private car lines or from shippers, must be distributed without discrimination. Hereafter the cars leased carriers by shippers or private car lines will be regarded as cars controlled by the carriers, which must be distributed without discrimination just as in

44 the case of cars owned by the carriers. This includes all cars secured from shippers for the use of which carriers pay compensation. Carriers should lease cars only upon such terms as permit

them to meet their obligation to furnish cars without discrimination. Under this ruling cars of complainants and of all other refiners upon defendant's line offered it for use at a compensation will become available to defendant for distribution among all shippers who may apply for them. At the same time, defendant will be under no obligation to accept for use any privately owned cars unless it chooses to do so. *Atchison Ry. Co. v. U. S.*, *supra*.

The responsibility to the shipper of furnishing a proper supply of cars rests upon the road upon which the shipper is located and the traffic originates. *Campbell's Creek Coal Co. v. A. A. R. R. Co.*, 33 I. C. C., 558, 562; *Coal Rates on the Stony Fork Branch*, 26 I. C. C., 168, 174. The originating line as between it and its connections does not necessarily rest under the burden of supplying all the cars which may be required for transportation over through routes and under joint rates, but in the case of through routes composed of two or more carriers the obligation to furnish cars for transportation over such through routes is joint upon the carrier therein. *Huerfano Coal Co. v. C. & S. E. R. R.*, 28 I. C. C., 502, 506; *Lumber Rates through Ohio River Crossings*, 29 I. C. C., 38, 39; *Pittsburgh & S. W. Coal Co. v. W. P. T. Ry. Co.*, 31 I. C. C., 660, 663.

One of the tests which may be relied upon in determining the reasonableness of a shipper's request for cars is to be found in the volume of his shipments in the past, due allowance being made for the growth of his business. Complainants have not only shown that the volume of their past shipments is such as to justify the demands for equipment which they have made but also have introduced evidence tending to show that in the future the volume of their business will be as great as in the past. Defendant will be required, upon reasonable request and reasonable notice, to furnish tank cars in sufficient number to move complainants' normal production. Defendant can not be required to furnish all the cars which may be demanded by complainants under extraordinary conditions arising from exceptional causes, which could not reasonably have been anticipated and which make it physically impossible to furnish all the cars desired.

An appropriate order will be entered.

CLARK, Commissioner, dissenting:

I am unable to agree with the conclusions reached by the majority. I do not think that the enactment of the provision of section 1 of the act, "and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation

45 upon reasonable request therefor," enlarged the obligations or duties laid upon the carriers in this respect by the common law. It seems to me to have been the incorporation in the act of a declaration of the common-law duty of the carrier as a foundation for the exercise of the powers conferred upon the commission by the act. The terms "railroad" and "transportation" are defined in sec-

tion 1 in terms which are and were intended to be inclusive of all of the carrier's transportation facilities that are subject to regulation under the act. Section 15 enumerates various powers that are conferred upon the commission, and provides that that enumeration shall not exclude any power which the commission would otherwise have under the provisions of the act. Section 20 specifies certain liabilities which shall rest upon the carrier in the event of loss of or damage to property received by it for transportation, and provides that nothing in the section shall deprive the holder of the carrier's receipt or bill of lading of any remedy or right of action which he has under existing law. There is no language in section 1 which indicates a legislative intent to expand the common-law duty of carriers to furnish facilities for transportation.

The majority report in the instant case reasserts the possession by the commission of powers that were asserted in the majority report in *Vulcan Coal & Mining Co. v. I. C. R. R. Co.*, 33 I. C. C., 52. If the act confers upon the commission power to order a carrier to enlarge its complement of cars and to award damages against it if it fails to comply with such order, it seems logically and necessarily to follow that the commission has the same power to order enlargement of terminal facilities, increase in the number of locomotives, and extension of tracks or branches. In fact, no facility of transportation is exempt. I think that this power is vested in the courts and not in the commission. For the reasons that were more fully stated in the dissent in the *Vulcan Coal & Mining Co.* case, *supra*, I am not able to accept the views of the majority on this point.

There can be no question of the right and power of the commission to so regulate the use of the facilities possessed by the carrier that there shall be no unjust discrimination. Plainly the shipper should not be required to deal with any other than the carrier in contracting for and receiving transportation, and such was plainly the intent of the Congress when all of the facilities were made subject to the act, regardless of ownership thereof. I, of course, agree that the carrier may provide facilities by purchase, lease, or rental, and that by whatever means they are acquired by the carrier the shipper has a right to demand the use thereof and service therefrom without unjust discrimination against or undue preference in favor of any.

Commissioner Clements requests me to say that he concurs in this dissent.

46 HARLAN, *Commissioner*, also dissenting:

I concur in the general thought underlying the dissenting report herein of my brother Clark, namely, that the language in the act upon which the majority report is largely based is simply declaratory of the general duty of carriers at common law to furnish such cars and other facilities as are reasonably necessary to enable them to fulfill their public obligations, but does not impose upon this com-

mission any such administrative duty or any such jurisdiction and power as are asserted in the majority report and in the order accompanying it.

47

ORDER.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of May, A. D. 1915.

No. 5574.

PENNSYLVANIA PARAFFINE WORKS V. THE PENNSYLVANIA RAILROAD COMPANY.

No. 5574 (Sub-No. 1).

CREW-LEVICK COMPANY V. SAME.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered that the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist, on or before August 15, 1915, and thereafter to abstain, from refusing upon reasonable request and reasonable notice therefor to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the act to regulate commerce and amendments thereto.

It is further ordered that said defendant be, and it is hereby, notified and required to provide, on or before August 15, 1915, and thereafter to furnish, upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

And it is further ordered that this order shall continue in force for a period of not less than two years from the date when it shall take effect.

By the commission.

[SEAL.]

GEORGE B. MCGINTY,

Secretary.

48 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY	}	No. 38, November Term, 1915.
<i>vs.</i>		
UNITED STATES OF AMERICA.		

Filed July 9th, 1915. J. Wood Clark, clerk.

SERVICE OF NOTICE.

And now, to wit, this 9th day of July, 1915, comes C. F. C. Arensberg, who, being duly sworn, deposes and says that on July 6, 1915, he sent by registered mail a true and correct copy of the petition filed by the plaintiff in the above proceeding to T. W. Gregory, Attorney General of the United States, at the Department of Justice, Washington, D. C., the registry return receipt showing the receipt thereof by the Attorney General being attached hereto.

CHARLES F. C. ARENSBERG.

Sworn to and subscribed before me the day and year aforesaid.

[SEAL.]

EMMA M. HALLER,
Notary Public.

My commission expires March 9, 1919.

a Among the rolls, records and judicial proceedings had in the United States District Court for the Western District of Pennsylvania at No. 38, November term, 1915, may be found the following words and figures, to wit:

THE PENNSYLVANIA RAILROAD COMPANY	}	No. 38. November Term, 1915.
<i>vs.</i>		
THE UNITED STATES OF AMERICA.		

Appearances: Henry Wolfe Bikle, Patterson, Crawford & Miller; Joseph W. Folk and Edward W. Hines for Interstate Commerce Commission; Blackburn Esterline & E. Lowry Humes for U. S. A.

DOCKET ENTRIES.

July 3, 1915, petition filed.

July 9, 1915, proof of service of petition upon T. W. Gregory, Attorney General of the United States, filed.

July 13, 1915, proof of service of petition upon George B. McGinty, secretary of the Interstate Commerce Commission, filed.

Aug. 2, 1915, motion of United States to dismiss petition of Penna. R. R. Co. and acceptance of service of motion by attorneys for complainant filed.

Sept. 16, 1915, præcipe for appearance of Joseph W. Folk and Edward W. Hines for Interstate Commerce Commission filed.

Sept. 16, 1915, motion to dismiss argued C. A. V.

Nov. 9, 1915, majority opinion, Judges Woolley and Orr, concurring, suspending and annulling the order of the Interstate Commerce Commission, in accordance with the prayer of the petition, filed and entered.

Nov. 9, 1915, minority opinion, Judge Thomson dissenting and holding that the plaintiff's petition should be dismissed, filed and entered.

Nov. 13, 1915, interlocutory decree enjoining order of Interstate Commerce Commission filed and entered and exception and objection by defendants noted.

Dec. 7, 1915, petition for appeal filed.

Dec. 7, 1915, order allowing appeal filed and entered.

Dec. 7, 1915, assignments of error filed.

Dec. 7, 1915, citation awarded, issued, and service accepted by Henry Wolf Bikle and Thos. Patterson, solicitors for the Pennsylvania Railroad Company, appellee.

Dec. 7, 1915, præcipe for record filed.

Dec. 14, 1915, notice to attorney general of State of Pennsylvania of appeal filed.

49 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY	} No. 38. November
<i>vs.</i>	
UNITED STATES OF AMERICA.	} Term, 1915.

Filed July 13th, 1915. J. Wood Clark, clerk.

SERVICE OF NOTICE.

And now, to wit, this 13th day of July, A. D. 1915, comes C. F. C. Arensberg, who, being duly sworn, deposes and says that on July 6, 1915, he sent by registered mail a true and correct copy of the petition filed by the plaintiff in the above proceeding to George B. McGinty, secretary of the Interstate Commerce Commission, at Washington, D. C., the registry return receipt showing the receipt thereof by the secretary being attached hereto.

C. F. C. ARENSBERG.

Sworn to and subscribed before me the day and year aforesaid.

[SEAL.]

EMMA M. HALLER,
Notary Public.

My commission expires March 9, 1919.

50 In the District Court of the United States for the Western
District of Pennsylvania.

November Term, 1915.

THE PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT,	} In Equity, No. 38.
<i>v.</i> UNITED STATES OF AMERICA, DEFENDANT.	

Filed Aug. 2d, 1915, J. Wood Clark, clerk.

MOTION OF THE UNITED STATES TO DISMISS THE PETITION.

Comes now the United States, defendant, by its counsel, and moves the court to dismiss the petition in the above-entitled cause at the cost of the petitioner.

As grounds for this motion it is shown—

1. The petition including the exhibits attached thereto and made a part thereof is without equity on its face and does not state any cause of action against the defendant, and the court may not grant the relief prayed or any part of the same.

2. It appears from the petition and the exhibits attached thereto and made a part thereof that the order of the Interstate Commerce Commission sought to be enjoined, set aside, annulled, or suspended was authorized by the act to regulate commerce, and that it was regularly made and entered by the commission in a proceeding properly pending and conducted.

51 3. The report of the Interstate Commerce Commission and the order entered in pursuance thereof were made and entered after a full hearing and due notice and rest on substantial evidence adduced on the issues made by the parties and the matters and things alleged in the petition and sought to be put in issue are foreclosed by the findings of fact.

4. The complainant has not in and by its said petition shown that in making its said orders the Interstate Commerce Commission transcended the powers conferred upon it by the statute or violated any right of the petitioner protected by the Constitution of the United States or any other right of the petitioner over which this court may exercise jurisdiction.

Wherefore, and for divers other good causes appearing on the face of the said petition more fully to be pointed out on the hearing hereof, this defendant prays that its motion be sustained, and for such other and further action as may be appropriate in the premises.

E. LOWRY HUMES,

United States Attorney, Western District of Pennsylvania.

BLACKBURN ESTERLINE,

Special Assistant to the Attorney General.

We hereby accept service of notice of the filing of motion of the United States to dismiss the petition in the above-entitled case, of which the foregoing is a copy.

_____,
Attorneys for Complainant.

PITTSBURGH, PA., August 2, 1915.

52 Service accepted of the within motion this 3rd August, 1915.

PATTERSON, CRAWFORD & MILLER,
Solicitors P. R. R.

53 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT,	} In Equity, No. 38.
<i>v.</i>	
THE UNITED STATES OF AMERICA, DEFENDANT.	

Filed Sept. 16, 1915. J. Wood Clark, clerk.

APPEARANCE OF THE INTERSTATE COMMERCE COMMISSION.

We hereby enter the appearance of the Interstate Commerce Commission and of ourselves as counsel in the above-entitled cause.

JOSEPH W. FOLK,
EDWARD W. HINES,
Counsel for the Interstate Commerce Commission.

54 In the District Court of the United States for the Western District of Pennsylvania.

PENNSYLVANIA RAILROAD COMPANY, COM-
plainant,

vs.

UNITED STATES OF AMERICA AND CREW- Levick Company, a corporation of the Commonwealth of Pennsylvania, de- fendants.	} No. 38, Nov. term, 1915.

PENNSYLVANIA RAILROAD COMPANY, COM-
plainant,

vs.

UNITED STATES OF AMERICA AND PENNSYL- vania Paraffine Works, a corporation of the Commonwealth of Pennsylvania, de- fendants.	} No. 39, Nov. term, 1915.

Filed Nov. 9th, 1915. J. Wood Clark, clerk.

Petition for an interlocutory order or preliminary injunction restraining and suspending, until the final determination of this

cause, an order of the Interstate Commerce Commission, requiring the Pennsylvania Railroad Company to cease and desist from pursuing certain practices found to be in violation of the provisions of the act to regulate commerce. Motion to dismiss the petition.

Before Woolley, Circuit Judge, and Orr and Thomson, District Judges.

The refined-oil product of this country is carried and transported in tank cars, by pipe lines, and by rail in barrels or similar containers.

The cost of carrying oil in barrels is three and one-half cents a gallon above the cost of carrying it in tank cars, due to freight charges on the weight of the barrels and to the added cost of handling, maintenance, and replacement, making shipment by this method expensive, if not prohibitive.

Ninety-one per cent of the refined-oil product is carried in tank cars, the remainder being carried by pipe lines and by rail in barrels. The oil carried in tank cars is consigned and shipped almost exclusively in privately owned tank cars; that is, tank cars owned by or leased to the shipper, for the use of which the carrier pays
55 wheelage. The number of tank cars in the United States is 40,000. The number of privately owned tank cars east of the Mississippi River is 27,700. The Pennsylvania Railroad Company owns 499. Other carriers east of the Mississippi River own in the aggregate 303. Some carriers own none.

Fifty-two kinds of articles used for food and in the arts are shipped in tank cars. Differences in the nature and uses of the articles make impossible the interchange of tank cars for their shipment.

The Pennsylvania Railroad Company publishes rates for the transportation of oil in tank cars and furnishes tank cars within the limit of its supply.

The oil refineries of the Pennsylvania Paraffine Works and Crew-Levick Company are situate in the State of Pennsylvania and are served by the Pennsylvania Railroad Company and the New York Central Railroad Company. The Pennsylvania Paraffine Works ships monthly about 750,000 gallons of refined oil, of which ninety-one per cent moves in tank cars, one and one-half per cent in barrels, and the remainder in pipe lines.

Crew-Levick Company ships monthly about 500,000 gallons of refined oil, of which eighty-six per cent moves in tank cars and about five per cent in barrels, and the remainder in pipe lines. The former company owns 54 tank cars and the latter company fifty-seven.

It developed in the testimony that the tank cars furnished by the railroad company, in addition to the complainants' privately owned tank cars, were not at all times sufficient to meet the requirements of the complainants' business. During a specimen period it appears that of the monthly shipments of the product of the former company eighty-three carloads were carried in its privately owned tank

cars and thirteen carloads in tank cars furnished by the railroad company; and of the monthly shipments of the product of the latter company, 70 carloads were carried in its privately owned tank cars and 12 carloads in tank cars provided by the railroad company.

The tank cars owned by the two companies, together with their pro rata share in the distribution of the tank cars of the railroad company, being inadequate for their requirements, and conceiving it to be the duty of the railroad company to furnish tank cars of the type and in the number required, the two companies demanded of the Pennsylvania Railroad Company a sufficient number of tank cars in which to ship their monthly product. To this demand 56 the railroad company replied, "We beg to say that the railroad company is not prepared to increase its present tank-car equipment but is prepared to transport the commodity, when properly contained in barrels or other similar containers, at rates that are fair, reasonable, and nondiscriminatory." Whereupon complaints were lodged with the Interstate Commerce Commission, a hearing held, and the following order made:

"It is ordered that the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist on or before August 15, 1915, and thereafter to abstain, from refusing upon reasonable request and reasonable notice therefor to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the act to regulate commerce and amendments thereto.

"It is further ordered that said defendant be, and it is hereby, notified and required to provide, on or before August 15, 1915, and thereafter to furnish, upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

"And it is further ordered that this order shall continue in force for a period of not less than two years from the date when it shall take effect."

After securing an extension of the order the railroad company filed its petition in this court, praying that a preliminary injunction be entered restraining and suspending the order of the Interstate Commerce Commission. The Government moved to dismiss the petition. The motion and the petition were heard together.

Woolley, circuit judge (after stating the facts as above):

The proceeding now before the court was instituted and conducted under section 13 of the act to regulate commerce, giving to any person complaining of anything done or omitted to be done by a common carrier in contravention of the provisions of the act, the right to apply to the Interstate Commerce Commission for redress; and after a finding adverse to the carrier the order entered was made under section 15 of the act, which provides in effect that whenever, after hearing, the commission shall be of opinion that a prac-

57 tice of a carrier is unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of the act, the commission is authorized and empowered to determine and prescribe what practice is just, fair, and reasonable, and to order the carrier to cease and desist from the unlawful practice, and thereafter to conform to and observe the regulation or practice prescribed, under penalty of five thousand dollars for each offense.

The practice of the railroad company, found by the commission in this instance to be violative of the statute, is not that the railroad company discriminated against the shipper by an unequal distribution of tank cars. It is conceded that the commission may require a carrier to desist from a discriminatory practice in car distribution. This is one of the admitted powers of the commission to be exerted over a carrier in the use of the instrumentalities which it possesses.

What the commission found was that the railroad company was guilty of an unjust and an unreasonable practice in not possessing or in not acquiring and furnishing tank cars in sufficient number to meet the requirements of the complainants' business.

The question in this case, in the abstract, is whether the act to regulate commerce, as amended, imposes upon a carrier the duty to acquire and to provide and furnish transportation of a type that, physically or economically, is best adapted to the needs and uses of the shipper, of which the Interstate Commerce Commission is the judge. The precise question is whether the Interstate Commerce Commission has power to compel the Pennsylvania Railroad Company to purchase and acquire tank cars for the shipment of oil, and to provide the same to complaining shippers upon requests which the commission may adjudge reasonable.

For the validity of its order the Interstate Commerce Commission relies upon several provisions of the act to regulate commerce as amended and upon certain changes and differences in the act created by its amendments. The first section of the act, both in its original and amended state, contains definitions of different branches of the subject with which the act deals. The terms "common carrier," "railroad" and "transportation," are, by express language, given their statutory meaning. Section 1 of the act of 1887 provides that

58 "the term 'transportation' shall include all instrumentalities of shipment or carriage." As amended by the act of 1906, the term "transportation" is enlarged and is made to "include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." Having stated of what transportation consists, the section prescribes it to "be the duty of every carrier * * * to provide and furnish such transportation upon reasonable request therefor."

Excerpts from several opinions of the Supreme Court were cited in support of the Government's contention that a railroad company, holding itself out as a carrier, is under a legal obligation arising out of the fact of its employment to provide transportation means and facilities commensurate with the demands of shippers, without regard to whether they possess them or have the money with which to acquire them. These excerpts were, of course, not cited as decisive of the question in issue, because upon examination it is disclosed that the cases from which they were taken were decisive of matters altogether different. These expressions of the Supreme Court, standing alone and considered without reference to the facts of the cases in which they appear, seem to support the Government's contention, but an examination of the cases discloses that the suitable and necessary means and facilities which the Supreme Court has said the carrier must provide, have especial reference and relation to the facts of those cases, which in nearly every instance present questions of discrimination or of "services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling or property transported," as specifically provided by the statute. In none of them was the question raised or decided nor in any did the Supreme Court reveal its opinion as to whether there devolved upon a carrier a statutory duty to provide and furnish transportation of a type it did not possess, or to acquire such transportation in order to provide and furnish the same upon reasonable request. *Railroad Co. vs. Pratt*, 22 Wall., 123, 128; *Covington Stock Yards Co. vs. Keith*, 139 U. S. 128, 133; *Arlington Heights Fruit Exchange vs. Southern Pacific Co.*, 20 I. C. C., 106, affirmed by the Supreme Court in *Acheson Ry. Co. vs. United States*, 232 U. S., 199; *Chicago, Rock Island and Pacific Ry. Co. vs. Hardwick Farmers' Elevator Co.*, 226 U. S., 426; *Missouri, Kansas and Texas Ry. Co. vs. Harris*, 234 U. S., 412, 418; *Yazoo and Mississippi Valley R. R. Co. vs. Greenwood Grocery Co.*, 227 U. S., 1; *St. Louis, Iron Mountain and Southern Ry. Co. vs. Edwards*, 227 U. S., 265; *Hampton vs. St. Louis, Iron Mountain and Southern Ry. Co.*, 227 U. S., 456; *Penn Refining Co. vs. Western New York and Pennsylvania R. R. Co.*, 208 U. S., 208; *Texas and Pacific Ry. Co. vs. Abilene Cotton Oil Company*, 204 U. S., 426; *Baltimore and Ohio R. R. Co. vs. United States, Ex. Rel. Pitcairn Coal Co.*, 215 U. S., 481.

There is thus presented for decision, with little, if any, aid from previous deliverance by the courts, the original question which divided the Interstate Commerce Commission in this case and in the case of *Vulcan Coal and Mining Company vs. I. C. R. R. Co.*, 33 I. C. C., 52, whether the duty imposed upon a carrier to provide and furnish cars to the shipper is the duty imposed by the common law or is a different and a broader duty prescribed by the statute, and whether the power of the Interstate Commerce Commission to prevent undue preference and unjust discrimination in the use of a carrier's cars has been enlarged and expanded into a power to con-

trol the "practices" of carriers by determining and prescribing the type and character of "all (their) instrumentalities and facilities of shipment or carriage" in order to procure for the shipper a better, safer, and more economic transportation service.

In seeking the authority of the commission to make the order in controversy we have nothing to do with the merit of the order, the injustice of the practice found to exist, or the wisdom of the practice established (Texas and Pacific Ry. Co. vs. I. C. C., 162 U. S., 197, 219; I. C. C. vs. Alabama Midland Ry. Co., 168 U. S., 144, 170), nor have we anything to do with the effect of the order upon private car lines. We are concerned only with the law under which the order was made and the commission acted, assuming its findings of fact to be conclusively correct. I. C. C. vs. Illinois Central Ry. Co., 250 U. S., 452; Baltimore and Ohio Railroad Co. vs. United States, Ex Rel. Pitcairn Coal Co., 215 U. S., 481; Pennsylvania Company vs. United States, 236 U. S., 351, 361.

The question of the duty of the carrier and the correlative question of the commission's power to enforce the performance of that duty, as they are presented in this case, had their rise in a change in the definition of the term "transportation" made by the amendment of 1906. Section 1 of the original act prescribed that "the term 'transportation' shall include all instrumentalities of shipment or carriage." Instrumentalities of shipment, of course, include cars, and cars have been treated as such from the date of the act to the date of its amendment in 1906. But in *Scofield vs. Lake Shore and Michigan Southern Railway Co.*, 4 I. C. C., 158; 2 I. C. R., 67, 76, the Interstate Commerce Commission considered that the sole duty of a carrier to furnish cars was that imposed by the common law and that the statute creating the commission did not clothe it with power to determine the instrumentalities of shipment to be employed by a carrier or to require a carrier to use in its business the kind and number of cars which the commission may deem necessary for a proper car service. In discussing this case the commission said that "the power, if it should be held to exist at all, on the part of the Interstate Commerce Commission to require a carrier to furnish tank cars when that carrier is furnishing none whatever in its business would apply equally to sleeping cars, parlor cars, fruit cars, refrigerator cars, and all manner of cars as occasion might require and would be limited only to the necessities of interstate commerce and the discretion of the Interstate Commerce Commission. A power so extraordinary and so vital, reached by construction, could not justly rest upon any less foundation than that of direct expression or necessary implication, and we find neither of these in the statute."

It is contended, however, that by the amendatory act of 1906, changing the definition of the term "transportation," there is such direct statutory expression conferring such extraordinary power, and that the measure of duty theretofore resting upon the carrier to furnish cars was changed from a common-law duty, with resort to the

courts for its violation, to a statutory duty, with redress for its violation by the Interstate Commerce Commission. The act of 1906 as before noted prescribes that "the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage" and certain defined services to be rendered in connection therewith. The services defined are the principal additions to the definition and relate to the receipt, delivery, transfer, ventilation, refrigeration, storage, and handling of property transported. With these we have nothing to do in this

61 case, except to note that they constitute the principal, if not the entire, additions to the old definition and are subject matters of the commission's control not embraced in the original act. While the word "cars" was not used in the definition of transportation as contained in the original act, it has never been doubted that in the words "instrumentalities of shipment" and within the term "transportation" cars were included.

The definition of the term "transportation" as it appears in the amendment of 1906, so far as it relates to cars, does nothing more than express what was implied in the original definition, and contains nothing which suggests that in furnishing transportation there shall rest upon the carrier a duty to furnish cars of a kind different from those required of the carrier under the original act.

We find no case prior to the amendatory act of 1906 which questioned that cars were "instrumentalities of shipment or carriage." If such a question existed, then the act of 1906, naming cars as one of the instrumentalities of shipment, might have been a change with a purpose, creating a difference in legal effect.

In seeking the effect of the amendment of 1906, inquiry may be made with respect to the purpose of Congress in enacting it. It is apparent from the addition to the definition of "transportation" contained in the amendment that Congress intended and clearly succeeded in including within that term certain services which theretofore had not been embraced within it and over which Congress deemed it advisable that the Interstate Commerce Commission should have power and control. These were ventilation, refrigeration, icing, storage, and handling of property transported. This power was conferred upon the commission for the avowed purpose, among others, of relieving the shipper of the task and annoyance of dealing with more than one person. These were new matters and therefore were additions to what was meant by transportation as defined in the original act. But the addition of the word "cars" in the amendment made no addition to the definition in the original act, because cars were already embraced within it.

We find nothing in the original or amended act which, by express language, imposes upon a carrier the extraordinary duty or
62 confers upon the Interstate Commerce Commission the extraordinary power claimed by the Government in this proceeding. If they exist, they can be found only by implication, and it is doubtful if Congress would leave to implication an intention

to impose so onerous a duty and to grant so great a power. On the other hand, we find in the act, by clear expression, duties imposed upon carriers which are not absolute in their nature, but are qualified by the ability of the carriers to conform to the duties prescribed.

The provision of the act requiring a carrier to maintain and operate switch connections with lateral or branch-line railroads, appearing in the last paragraph of the first section of the act, imposes upon a carrier the duty to "furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper." The words "to the best of its ability," of course, qualify the duty to maintain switch connections, and do not qualify the prohibited discrimination.

Again, in section 3 of the act, it is provided that "every common carrier * * * shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for receiving, forwarding, and delivering of passengers and property." Here, again, the carriers' duty to provide and furnish facilities of transportation is not absolute. The duty is laid upon them "according to their respective powers." Such expressions rather raise the implication that Congress did not intend to place an absolute and unqualified duty upon carriers to furnish cars of a certain type whether they had them or not, and if they did not have them, then to acquire them, whether they had the money or not. Restricting our construction of the act to its words, and finding nothing by implication that changes or qualifies their meaning, we are of opinion that the amendment of 1906, including cars within the definition of "transportation," added nothing to the original duty of the carrier as prescribed by the original act and as interpreted by the commission, and vested in the commission no increase of power over cars as instrumentalities of shipment. If, under the act as amended, no different or greater duty is imposed upon a carrier with respect to furnish-
 63 ing and providing cars than was prescribed by the original act, then the practice of the carrier found unlawful in this case was not in violation of the statute, and the order of the commission directing the carrier to desist from that practice was an exercise of power not conferred by law.

The act to regulate commerce does not confer upon the Interstate Commerce Commission all power over cars and other instrumentalities of shipment. Congress has reserved unto itself, and from time to time has exercised, power to control and regulate certain instrumentalities of shipment, notably by the acts establishing the standard height of draw bars, prescribing safety appliances, and regulating the hours of service of the carriers' employees. But aside from special enactments of this class, Federal legislation regulating commerce, in so far at least as it is contained in the act of 1887 and its amendments, has thus far left carriers free to exercise their own judgment in the purchase, construction, and equipment of their roads and in the selection of their rolling stock. By this legislation

Federal control has been assumed over the use to which the carriers' roads and equipment are put, to the end that the flow of commerce, in the employment of those instrumentalities, may not be impeded, and that unjust rates shall not be charged and unfair practices pursued to the injury of persons and localities. The law clearly confers upon the commission power to so regulate the use of the facilities possessed by the carrier that there shall be no unjust discrimination, but we find nothing in the law which confers upon the commission power to compel a carrier to acquire facilities it does not possess or to acquire better facilities than those it possesses, not with the object of preventing discrimination and preferences, but in order that the shipper may have larger, better, and perhaps more economical facilities. We are of opinion that in making the order the Interstate Commerce Commission exceeded its statutory power, and that the order should be suspended and annulled in accordance with the prayer of the petition.

Thomson, District Judge, dissents.

64 In the District Court of the United States for the Western District of Pennsylvania.

PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT, VS. UNITED STATES OF AMERICA AND CREW-LEVICK COMPANY, A CORPORATION OF THE COMMONWEALTH OF PENNSYLVANIA, DEFENDANTS.

PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT, VS. UNITED STATES OF AMERICA AND PENNSYLVANIA PARAFFINE WORKS, A CORPORATION OF THE COMMONWEALTH OF PENNSYLVANIA, DEFENDANTS.

Filed Nov. 9th, 1915. J. Wood Clark, clerk.

Thomson, J. (dissenting).

Finding myself unable to concur in the conclusion reached by the majority of the court, I have thought proper, in view of the importance of the case, to briefly assign the reasons which control my judgment.

We have nothing to do with the wisdom of the order. The findings of the commission are presumed to be true and to have justified its action, if only the power to exercise it exists. On this question of power alone the commission was divided. If there rested no legal duty on the carrier to provide the transportation called for, it follows that the commission was without power to make the order in question. The conclusion of the court adverse to the action of the commission is concisely set forth in the concluding portion of the majority opinion thus:

"The law clearly confers upon the commission power to so regulate the use of the facilities possessed by the carrier that there shall be no unjust discrimination, but we find nothing in the law which confers upon the commission power to compel a carrier to acquire facilities it does not possess or to acquire better facilities than those

it possesses, not with the object of preventing discrimination and preferences, but in order that the shipper may have larger, better, and perhaps more economical facilities."

This is the issue, and the solution of the question must be found mainly in the proper interpretation of the term "transportation" as used in the amendment of 1906.

In the original act of February 4, 1887, it is said: "The term 'transportation' shall include all instrumentalities of shipment or carriage." These words are clearly comprehensive enough to include cars as an instrument of shipment. But we need not stop to conjecture as to their full breadth and meaning. It is sufficient that Congress thought proper to enlarge the scope of the term "transportation" by providing in the act of 1906 as follows: "The term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported, and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor and to establish through routes and just and reasonable rates applicable thereto." This, instead of being a concise and accurate definition of the term "transportation," is rather a legislative declaration of what the term shall include. Much broader than the words "all instrumentalities of shipment and carriage" in the original act are the words of the amendment, "cars and other vehicles and all instrumentalities and facilities of shipment or carriage." The very comprehensive word "facilities" of shipment and carriage was a significant addition to the original act. These words are again made more comprehensive by the words which follow, "irrespective of ownership or of any contract, express or implied, for the use thereof." Whether held by the carrier by purchase, hire, exchange, lease, bailment, or any contract for their use, express or implied, they are to be regarded as the instruments of the carrier, and the shipper, as well as the commission, is thus relieved of the annoyance of dealing with more than one person. The scope of the term transportation is again enlarged by the use of the words "and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." Having thus defined transportation, it is then declared to be the duty of every carrier subject to the provisions of the act to provide and furnish such transportation upon reasonable request therefor.

Whatever may have been the duty resting on a carrier at common law to furnish transportation of the shipper's property, it admits of no doubt that the furnishing of transportation, as defined by the act, has been made a clear statutory duty of the carrier. As

was said by Chief Justice White in Chicago, R. I. & Pac. R. R. Co. v. Hardwick Elevator Co., 226 U. S., 426:

"The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is, of course, by these provisions clearly declared. * * * Not only is there, then, a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty."

It is plainly the duty of the carrier not only to furnish cars on reasonable request but to furnish cars reasonably suitable for the proper transportation of the freight to be shipped. This general proposition is stated by Hutchinson on Carriers, sec. 536, as follows:

"If the goods are of such a nature as to require for their protection some other kind of car than that required for ordinary goods and cars adapted to the necessity are known and in customary use by carriers, it is the duty of the carrier, where he accepts the goods, to provide such cars for their carriage."

In Covington Stock Yards Co. v. Keith, 139 U. S., 128, Justice Harlan, speaking for the Supreme Court, said:

"The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in respect to such matters is whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public."

In the same opinion the court says:

"The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported as well as to the necessities of the respective localities in which it is received and delivered."

This case, assuming that proper facilities for the transportation of the stock must be furnished, goes further and extends the duty of the carrier to providing suitable means for its receipt and discharge.

If, then, it is the duty of the carrier on reasonable request to furnish coal cars to the shipper of coal, stock cars to the shipper of live stock, fruit cars, with refrigeration, for the shipper of fruit, on no principle could the oil shipper be denied cars reasonably suited for the shipment of oil.

67 The word "reasonable," as used in the act, is a qualifying and saving term. Not merely the demands and needs of the shipper are to be considered, but the circumstances of the carrier, and the rights of the public as well. The fitness and efficiency of the transportation requested; whether the facilities of shipment would be made better and more economical; the public advantage to

be derived therefrom; the cost and expense in relation to the benefit resulting; all the circumstances, time and place, and means as affecting the carrier and its ability to supply the transportation demanded—these and all other relevant matters may be considered in determining the reasonableness of the shipper's demand. If the request be reasonable, it is the legal duty of the carrier to comply with it; if unreasonable, no such duty devolves upon the carrier. And this question of fact, in case of dispute, the commission must decide. Almost all duties are relative rather than absolute, and the exercise of a clearly vested power largely depends upon the facts which call for its exercise. Even the clearly expressed duty of the carrier to furnish cars on reasonable request is not absolute; *Hampton v. St. L., Iron Mt. & S. Ry. Co.*, 227 U. S., 467. Thus the right of the shipper to demand transportation, on the one hand, is conditioned on the fact that his request be reasonable; and the duty, on the other, to comply is not absolute but dependent on the facts of the case. We are not passing on some abstract proposition as to the power of the commission to order, without restraint, the equipment and furnishing of cars without reference to conditions or circumstances. We are passing on a concrete question based on specific facts, conclusively found by the commission. It would be easy to imagine on the part of a shipper an unwarranted and unreasonable request, and on the part of the carrier an arbitrary and unjust denial of a reasonable demand. The Interstate Commerce Commission is the tribunal standing between the parties with power to hear and determine, and especially competent by reason of experience to determine, with justness and uniformity of decision.

I can not agree with the proposition that the duty imposed upon the carrier to furnish cars is limited to those which the carrier may have on hand, or that there is no obligation to acquire facilities 68 it does not possess, or to acquire better facilities to meet the reasonable demands of the shippers. I base my conclusion on words of the act itself, "it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation on reasonable request therefor." No words more specific or definite than "provide and furnish" could have been chosen. I find no limitation of any kind in the act upon the duty thus imposed upon the carrier, except only that the request therefor be reasonable. There are no words from which it can fairly be assumed that existing ownership or control is a prerequisite to the carrier's duty to provide and furnish. From the explicit words of the act it would seem to follow that if a reasonable request is made for cars and the carrier does not possess them, it must acquire them for use by one of the many methods for their acquisition. If not, this most important provision of the statute would be rendered largely nugatory. Perhaps the most effective blow which Congress could deal at discrimination in interstate traffic is the duty imposed on the carrier to furnish transportation. There could be no more prolific source of discriminating practices than the right in the carrier to grant or

withhold the means of transportation at its discretion. The demands of the favored shipper would be met by promptly acquiring and furnishing the transportation called for. We do not have what you demand, would be a conclusive answer to the less favored. The flow of commerce is more vital to the public than that commerce should flow unimpeded. That transportation be furnished is more vital than that it be free from discrimination and preference. If the primary object of the act is to prevent discrimination, Congress evidently realized that the most effective method of prevention is to remove the opportunity for discrimination. We must assume that if Congress had intended to set limitations on that duty it would have done so in apt words, as it did with reference to other provisions of the act. For instance, the duty of the carrier to construct and operate switch connections with any lateral branch line of railroad or private side track is conditioned that such connection is reasonably practicable, and can be put in with safety, and will furnish sufficient business to justify the connection and maintenance of the same, and shall furnish cars for the movement of such traffic to the best of its ability. Again, the carrier's duty to furnish facilities for the interchange of traffic between their respective lines is qualified by the expression "according to their respective powers." It is highly significant, therefore, that the more important duty to furnish transportation has no limitation or condition, except upon the reasonable request of the shipper.

If the wisdom of the order in question, or its necessity, needed justification, it appears in the conclusive findings of the commission that 91% of the refined oil of the country is shipped in tank cars at a great economic gain. I would therefore dismiss the petition of the complainant company.

70 In the District Court of the United States for the Western District of Pennsylvania. November Term, 1915.

THE PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT,

v.

UNITED STATES OF AMERICA, DEFENDANT, AND INTER-
state Commerce Commission, intervening defendant.

In Equity,
No. 38.

Filed Nov. 13th, 1915. J. Wood Clark, clerk.

INTERLOCUTORY DECREE ENJOINING ORDER OF INTERSTATE COMMERCE
COMMISSION.

And now, to wit, this 13th day of November, 1915, at Pittsburgh. this cause came on for hearing before Circuit Judge Victor B. Woolley and District Judges Charles P. Orr and W. H. Seward Thomson on the application for an interlocutory injunction and the motions to dismiss, and the same were argued by counsel and sub-

mitted to the court. On consideration whereof, it was ordered, adjudged, and decreed as follows:

First. That the motion of the United States of America, defendant, to dismiss the petition be, and the same is hereby, overruled.

Second. That the motion of the Interstate Commerce Commission, intervening defendant, to dismiss the petition be, and the same is hereby, overruled.

Third. That the application of the complainant for an interlocutory injunction be, and the same is hereby, granted, as prayed in the petition, and that an interlocutory injunction be, and the same

71 is hereby, issued out of this court enjoining, annulling, and suspending the order of the Interstate Commerce Commission in the case of Pennsylvania Paraffine Works v. Pennsylvania Railroad Company, No. 5574 and The Crew-Levick Company v. Pennsylvania Railroad Company No. 5574 (Sub. No. 1), entered at a general session of the Interstate Commerce Commission at its office in Washington, D. C., on the 11th day of May, A. D. 1915, and that the said defendants, and each of them, their officers, members, examiners, agents, and attorneys, and any and all persons whomsoever be enjoined and restrained from enforcing, or in any manner attempting to enforce or carry out, the said order or the terms thereof until the further order of the court.

By the court:

CHARLES P. ORR,
*United States District Judge,
Western District of Pennsylvania.*

To which said order or decrees the defendants, and each of them, by their respective counsel, severally object and except.

CHARLES P. ORR,
*Judge U. S. District Court,
Western District of Pennsylvania.*

72 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, COM-
plainant,

v.

UNITED STATES OF AMERICA, DEFENDANT, AND
Interstate Commerce Commission, interven-
ing defendant.

In Equity, No. 38.

Filed Dec. 7, 1915. J. Wood Clark, clerk.

PETITION FOR APPEAL.

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, feeling themselves aggrieved

by the interlocutory order or decree of the District Court, entered November 13, 1915, pray an appeal to the Supreme Court of the United States from the said interlocutory order or decree.

The particulars wherein said defendant and the intervening defendant consider said interlocutory order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

And the said defendant and the intervening defendant pray that a transcript of the record, proceedings, and papers on which the said interlocutory order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

E. LOWRY HUMES,

United States Attorney, Western District of Pennsylvania.

BLACKBURN ESTERLINE,

Special Assistant to the Attorney General.

JOS. W. FOLK,

Solicitor for the Interstate Commerce Commission.

73 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, COM-
plainant,

v.

UNITED STATES OF AMERICA, DEFENDANT, AND
Interstate Commerce Commission, interven-
ing defendant.

In Equity, No. 38.

Filed Dec. 7, 1915. J. Wood Clark, clerk.

ORDER ALLOWING APPEAL.

In the above-entitled cause United States of America, defendant, and Interstate Commerce Commission, intervening defendant, having made and filed their petition praying an appeal to the Supreme Court of the United States from the interlocutory order or decree of the District Court, entered November 13, 1915, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided:

It is ordered and decreed that the said appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof; and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered to the Supreme Court of the United States.

CHAS. P. ORR,

United States District Judge,

Western District of Pennsylvania.

74 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT,

v.

UNITED STATES OF AMERICA, DEFENDANT, AND INTER-
state Commerce Commission, intervening defendant.

In Equity,
No. 38.

Filed Dec. 7th, 1915, J. Wood Clark, clerk.

ASSIGNMENT OF ERRORS.

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, now come, by their respective counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely on said appeal to the Supreme Court of the United States from the interlocutory order or decree of the district court, entered November 13, 1915, in the above-entitled cause.

The district court erred:

I.

In overruling the motion of the United States to dismiss the petition on the various grounds set forth in the said motion, and in not sustaining the said motion.

II.

In overruling the motion of the Interstate Commerce Commission to dismiss the petition on the various grounds set forth in the said motion, and in not sustaining the said motion.

III.

75 In granting the interlocutory injunction enjoining the order of the Interstate Commerce Commission entered May 11, 1915, on complaint of Pennsylvania Paraffine Works v. Pennsylvania Railroad Company, No. 5574, and The Crew-Levick Company v. Pennsylvania Railroad Company, No. 5574 (Sub. No. 1), and suspending the force and effect of the same, for that the petition of the complainant (a) does not set forth any cause of action and is insufficient to warrant the granting of the interlocutory injunction or to form the basis for any relief from the said order; (b) nor has the complainant shown that there is any equity in the said petition on which to grant the interlocutory injunction or to form the basis for any relief from the said order; (c) nor has the complainant shown that in making its said order the Interstate Commerce Commission acted beyond or without its jurisdiction or exceeded any

power or authority conferred on it by the act to regulate commerce; (d) nor has the complainant shown that in making its said order the Interstate Commerce Commission violated any right of the said complainant protected by the Constitution of the United States, or any other right of the said complainant over which this court may exercise jurisdiction.

IV.

In holding and adjudging that the Interstate Commerce Commission was and is without power and authority to enter the order in the case of *Pennsylvania Paraffine Works v. Pennsylvania Railroad Co.*, No. 5574, and *The Crew-Levick Co. v. Pennsylvania Railroad Co.*, No. 5574 (Sub. No. 1), entered at a general session of the Interstate Commerce Commission at its office in Washington on the 11th day of May, A. D. 1915.

V.

In entering the following decree:

"That the application of the complainant for an interlocutory injunction be, and the same is hereby, granted, as prayed in the petition, and that an interlocutory injunction be, and the same is hereby, issued out of this court enjoining, annulling, and suspending the order of the Interstate Commerce Commission in the case of *Pennsylvania Paraffine Works v. Pennsylvania Railroad Company*, No. 5574, and *The Crew-Levick Company v. Pennsylvania Railroad Company*, No. 5574 (Sub. No. 1), entered at a general session of the Interstate Commerce Commission at its office in Washington, D. C., on the 11th day of May, A. D. 1915, and that the said defendants, and each of them, their officers, members, examiners, agents, and attorneys, and any and all persons whomsoever be enjoined and restrained from enforcing, or in any manner attempting to enforce or carry out, the said order or the terms thereof until the further order of the

VI.

In finding and deciding as follows:

"We find nothing in the original or amended act which, by express language, imposes upon a carrier the extraordinary duty or confers upon the Interstate Commerce Commission the extraordinary power claimed by the Government in this proceeding. If they exist, they can be found only by implication, and it is doubtful if Congress would leave to implication an intention to impose so onerous a duty and to grant so great a power."

VII.

In finding and deciding as follows:

"The carriers' duty to provide and furnish facilities of transportation is not absolute. The duty is laid upon them 'according

77 to their respective powers.' Such expressions rather raise the implication that Congress did not intend to place an absolute and unqualified duty upon carriers to furnish cars of a certain type whether they had them or not, and if they did not have them, then to acquire them whether they had the money or not. Restricting our construction of the act to its words, and finding nothing by implication that changes or qualifies their meaning, we are of opinion that the amendment of 1906, including cars within the definition of 'transportation,' added nothing to the original duty of the carrier as prescribed by the original act and as interpreted by the commission and vested in the commission no increase of power over cars as instrumentalities of shipment. If, under the act as amended, no different or greater duty is imposed upon a carrier with respect to furnishing and providing cars than was prescribed by the original act, then the practice of the carrier found unlawful in this case was not in violation of the statute, and the order of the commission directing the carrier to desist from that practice was an exercise of power not conferred by law."

VIII.

In finding and deciding as follows:

"We find nothing in the law which confers upon the commission power to compel a carrier to acquire facilities it does not possess or to acquire better facilities than those it possesses, not with the object of preventing discrimination and preferences, but in order that the shipper may have larger, better, and perhaps more economical facilities. We are of opinion that in making the order the Interstate Commerce Commission exceeded its statutory power, and that the order should be suspended and annulled in accordance with the prayer of the petition."

IX.

In finding and deciding that—

"in none of them (cases subsequently cited in the opinion) was the question raised or decided nor in any did the Supreme Court reveal its opinion as to whether there devolved upon a carrier a statutory duty to provide and furnish transportation of a type it did not possess, or to acquire such transportation in order to provide and furnish the same upon reasonable request."

X.

78 In not finding and deciding that it is plainly the duty of the carrier not only to furnish cars on reasonable request, but to furnish cars reasonably suitable for the proper transportation of the freight to be shipped.

XI.

In not denying the application for interlocutory injunction and dismissing the petition.

Wherefore defendants and each of them pray that the said interlocutory order or decree of the district court, entered November 13, 1915, be reversed, annulled, and set aside, with directions that the petition be dismissed, and for such other and further order as may be appropriate.

E. LOWRY HUMES,
United States Attorney, Western District of Pennsylvania.
 BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
 JOS. W. FOLK,
Solicitor for Interstate Commerce Commission.

79 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, COM-
 plainant,

v.

UNITED STATES OF AMERICA, DEFENDANT, AND
 Interstate Commerce Commission, interven-
 ing defendant.

In Equity. No. 38.

Filed Dec. 7th, 1915. J. Wood Clark, clerk.

PRECIPUE FOR RECORD.

To the Clerk:

You will please prepare and certify a transcript of the entire record in the above-entitled cause to be filed in the office of the clerk of the Supreme Court of the United States, on the appeal from the interlocutory order or decree of the district court, entered November 13, 1915, and include in said transcript all of the pleadings, exhibits, notices, appearances, motions, orders, decrees, journal entries, appeal papers, and any other papers on file or of record in said cause.

E. LOWRY HUMES,
United States Attorney, Western District of Pennsylvania.
 BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
 JOS. W. FOLK,
Solicitor for Interstate Commerce Commission.

UNITED STATES OF AMERICA, ss:

To the Pennsylvania Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to an appeal duly allowed and filed in the clerk's office of the United States District Court, Western District of Pennsylvania, wherein United States of America

and Interstate Commerce Commission are appellants and you are appellee to show cause, if any there be, why the interlocutory order or decree rendered against said appellants in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles T. Orr, United States District Judge, Western District of Pennsylvania, this 7th day of December, 1915.

CHAS. P. ORR,
*United States District Judge,
Western District of Pennsylvania.*

Service of a copy of the within citation is hereby admitted this 7th day of December, 1915.

HENRY WOLF BIKLE,
THOS. PATTERSON,
*Solicitors for the Pennsylvania
Railroad Company, Appellee.*

81 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, COM-
plainant,
v.

UNITED STATES OF AMERICA, DEFENDANT, INTER-
state Commerce Commission and the Crew-
Levick Company, a corporation, intervening
defendants. In Equity. No. 38.

Filed Dec. 14th, 1915. J. Wood Clark, clerk.

To the Honorable FRANCIS SHUNK BROWN,
Attorney General of the State of Pennsylvania.

You are hereby notified that the above-entitled cause was this day appealed to the Supreme Court of the United States and that the order allowing the appeal makes the same returnable within thirty (30) days from this date.

This notice is given you pursuant to chapter 32, at pages 220 and 221 of the statutes of the United States, passed at the 1st session of the 63d Congress, 1913.

December 7, 1915.

E. LOWRY HUMES,
*United States Attorney, Western
District of Pennsylvania.*

I hereby acknowledge receipt of a copy of the above notice this date of December, A. D. 1915.

WM. M. HARGEST,
*Deputy Attorney General of the
State of Pennsylvania.*

82 (Certificate of exemplification.)

In the District Court of the United States for the Western District
of Pennsylvania.

PENNSYLVANIA RAILROAD COMPANY	}	No. 38. Nov. Term, 1915. In Equity.
<i>vs.</i>		
UNITED STATES OF AMERICA.		

WESTERN DISTRICT OF PENNSYLVANIA, ss:

I, J. Wood Clark, clerk of the district court of the United States for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record on appeal in the above-entitled case, so full and entire as the same remains of record and on file in my office, in the city of Pittsburgh, in said district.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 31st day of Dec., A. D. 1915.

J. WOOD CLARK, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, ss:

I, W. H. S. Thomson, district judge of the United States for said district, do hereby certify that J. Wood Clark, above named, was, at the time of making the above certificate, and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

W. H. S. THOMSON,
U. S. District Judge.

Pittsburgh, Dec. 31st, 1915.

WESTERN DISTRICT OF PENNSYLVANIA, ss:

I, J. Wood Clark, clerk of the district court of the United States for the Western District of Pennsylvania, do certify that the Honorable W. H. S. Thomson, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was, at the time of making thereof, and still is, judge of the district court of the United States in and for said district, duly commissioned and qualified; to all whose acts, as such, full faith and credit are and ought to be given, as well in the courts of judicature as elsewhere.

In testimony wherefore I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, in said district, this 31st day of Dec., A. D. 1915.

J. WOOD CLARK, *Clerk.*

UNITED STATES OF AMERICA, ss:

To the Pennsylvania Railroad Company, greeting: You are hereby cited and admonished to be and appear at a Supreme Court

of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to an appeal duly allowed and filed in the clerk's office of the United States District Court, Western District of Pennsylvania, wherein United States of America and Interstate Commerce Commission are appellants and you are appellee, to show cause, if any there be, why the interlocutory order or decree rendered against said appellants in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles P. Orr, United States district judge, Western District of Pennsylvania, this 7th day of December, 1915.

CHAS. P. ORR,
*United States District Judge,
Western District of Pennsylvania.*

Service of a copy of the within citation is hereby admitted this 7th day of December, 1915.

HENRY WOLF BIKLE,
THOS. PATTERSON,
Solicitors for the Pennsylvania Railroad Company, appellee.

(Indorsement on cover:) File No. 25073. W. Pennsylvania D. C. U. S. Term No. 790. The United States and Interstate Commerce Commission, appellants, vs. The Pennsylvania Railroad Company. Filed January 5th, 1916. Filed No. 25073.



REPORT OF THE

COMMISSIONERS OF THE

LAND OFFICE

IN

THE UNITED STATES DEPARTMENT OF THE
INTERIOR AND THE GENERAL LAND OFFICE

THE PENNSYLVANIA RAILROAD COMPANY

APPROVED FOR THE COMMISSIONERS OF THE LAND OFFICE
AND THE GENERAL LAND OFFICE

PHILADELPHIA, 1894

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 791.

THE UNITED STATES, INTERSTATE COMMERCE COMMISSION, AND THE CREW-LEVICK COMPANY, APPELLANTS,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

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a Among the rolls, records, and judicial proceedings and etc. had in the United States District Court for the Western District of Pennsylvania, at No. 39, November term, 1915, may be found the following words and figures, to wit:

THE PENNSYLVANIA RAILROAD COMPANY	} No. 39, November term, 1915.
vs. THE UNITED STATES OF AMERICA.	

Appearances: Henry Wolfe Bikle; Patterson, Crawford & Miller; Joseph W. Folk and Edward W. Hines for Interstate Commerce Commission; Blackburn Esterline and E. Lowry Humes for U. S. A.; George E. Spring for intervenor.

Docket entries.

- July 3, 1915. Petition filed.
- " 9, " Proof of service of petition upon T. W. Gregory, Attorney General of the United States, filed.
- July 13, " Proof of service of petition upon George B. McGinty, secretary of the Interstate Commerce Commission, filed.
- Aug. 2, " Motion of United States to dismiss petition of P. R. R. Co., and acceptance of service of motion by attorneys for complt., filed.
- Sept. 16, " Praecipe for appearance of Joseph W. Folk and Edward W. Hines, for the Interstate Commerce Commission, filed.
- " " " Petition of the Crew-Levick Company, successor to the Pennsylvania Paraffine Works, intervenor, filed.
- " " " Order filed and entered granting leave to the Crew-Levick Company to intervene and to appear as a party defendant within 10 days.
- " " " Answer of the Crew-Levick Company, intervenor, filed.
- Nov. 9, " Majority opinion, Judges Wooley and Orr concurring, suspending and annulling the order of the Interstate Commerce Commission, in accordance with the prayer of the petition, filed at No. 38, November term, 1915, entered.
- " " " Minority opinion, Judge Thomson dissenting and holding that the plaintiff's petition should be dismissed, filed at No. 38-11-15, entered.
- " 13, 1915. Interlocutory decree enjoining order of Interstate Commerce Commission filed and entered and exception and objection by defendants noted.
- Dec. 7, " Petition for appeal filed.
- " " " Order allowing appeal filed and entered.
- " " " Assignment of errors filed.

Dec. 7, 1915. Citation awarded, issued, and service accepted by Henry Wolf Bikle and Thos. Patterson, solicitors for the Pennsylvania Railroad Company, appellee.

" " " Præcipe for record filed.

" 14, " Notice to attorney general of State of Pennsylvania of appeal filed.

b No. 39, November term, 1915. In the District Court of the United States for the Western District of Pennsylvania. In equity. The Pennsylvania Railroad Company, complainant, vs. The United States of America, defendant. Petition. Patterson, Crawford & Miller, solicitors and counsel for complainant. Filed July 3rd, 1915. J. Wood Clark, clerk.

1 In the District Court of the United States for the Western District of Pennsylvania. Term, 1915. No. . In equity. The Pennsylvania Railroad Company, complainant, vs. the United States of America, defendant.

Petition.

To the honorable the judges of the said court:

The Pennsylvania Railroad Company, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, brings this, its petition, against the United States of America.

And thereupon your orator complains and says:

1. That it is a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, having been incorporated by an act of the General Assembly of that Commonwealth approved April 13th, 1846, entitled "An Act to Incorporate the Pennsylvania Railroad Company," and is a common carrier by railroad, possessed of all and every the corporate rights, privileges and franchises conferred by said act and by divers other acts supplementary thereto and amendatory thereof. That its principal operating office is located in the city of Philadelphia, in the State of Pennsylvania.

2. That the Pennsylvania Paraffine Works is a business corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, engaged in the business of refining crude oil, and having its residence and principal office in the city of Titusville and State of Pennsylvania, within the limits of the Western District of Pennsylvania.

3. That on or about the 26th day of February, A. D. 1913, the said The Pennsylvania Paraffine Works filed a certain petition before the Interstate Commerce Commission of the United States against the complainant herein, the same being docketed on the docket of the said Interstate Commerce Commission as docket No. 5574, a copy of which petition is annexed hereto, marked "Exhibit A," and is made part hereof.

4. That by the said petition the said The Pennsylvania Paraffine Works sought to obtain an order from the Interstate Commerce Commission requiring the Pennsylvania Railroad Company, complainant herein, to furnish to it, the said The Pennsylvania Paraffine Works, tank cars for the transportation in interstate commerce of oil refined at its refinery at Titusville.

5. That to the said petition your orator filed an answer before the said Interstate Commerce Commission denying any obligation on its part under the interstate commerce act, or under the law generally, to furnish vehicles of any specified description, and in particular tank cars, for the transportation in interstate commerce of oil refined by the said The Pennsylvania Paraffine Works at its refinery at Titusville, but averring full performance on its part of all its lawful duties in connection with the furnishing of transportation facilities to the said The Pennsylvania Paraffine Works. A copy of this answer, marked "Exhibit B," is annexed hereto and is made a part hereof.

6. That thereafter, to wit, on or about the 22d day of October, A. D. 1913, the Pennsylvania Railroad Company, your orator herein, filed with the Interstate Commerce Commission its motion to dismiss the complaint for the reason, as stated in the said motion, that the Interstate Commerce Commission was without jurisdiction to entertain the complaint or to grant the relief prayed for. A copy of the said motion is hereto attached, marked "Exhibit C," and made part hereof.

7. That thereafter, to wit, on or about the 19th day of November, A. D. 1913, a hearing was held before the Interstate Commerce Commission at Buffalo, New York, at which hearing testimony was taken on behalf of the said The Pennsylvania Paraffine Works and on behalf of the Pennsylvania Railroad Company, your orator herein. That at the same time and conjointly with the testimony in the said proceeding and by agreement between the parties testimony was taken in a similar proceeding brought against your orator by the Crew-Levick Company, the said proceeding being known on the docket of the Interstate Commerce Commission as docket No. 5574, sub number 1.

8. That thereafter, to wit, on the 11th day of March, A. D. 1914, briefs having been filed by both parties to the proceeding brought by the Pennsylvania Paraffine Works against the Pennsylvania Railroad, complainant herein, and to the proceeding brought by the Crew-Levick Company against the Pennsylvania Railroad Company, complainant herein, the two cases were argued before the Interstate Commerce Commission at Washington, D. C., and submitted for decision.

9. That thereafter, to wit, on the 11th day of May, A. D. 1915, the Interstate Commerce Commission made a report and entered an order in the two proceedings above referred to, applicable severally and individually to each one, a copy of which report and order is

hereto attached, marked "Exhibit D" and made a part hereof. The order entered by the commission is in the following language, to wit:

"It is ordered that the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist, on or before August 15, 1915, and thereafter to abstain from refusing, upon reasonable request and reasonable notice therefor, to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the act to regulate commerce and amendments thereto.

"It is further ordered that said defendant be, and it is hereby, notified and required to provide on or before August 15th, 1915, and thereafter to furnish, upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

"And it is further ordered that this order shall continue in force for a period of not less than two years from the date when it shall take effect.

"By the commission.

[SEAL.]

"GEORGE B. MCGINTY,

"Secretary."

10. That the Pennsylvania Railroad Company, complainant
5 herein, is advised by counsel and therefore avers that neither the act of Congress to regulate commerce, commonly known as the interstate commerce act, nor any other law imposes on the complainant the obligation to supply tank cars for the transportation of petroleum, and that the order of the Interstate Commerce Commission entered in the proceedings heretofore referred to and quoted above in this petition is without lawful warrant.

11. That the Pennsylvania Railroad Company, complainant herein, is advised by counsel, and therefore avers, that neither the act of Congress to regulate commerce commonly known as the interstate commerce act, nor any other law, confers upon the Interstate Commerce Commission authority to make the order referred to and quoted above in this petition.

12. That the Pennsylvania Railroad Company, complainant herein, is advised by counsel, and therefore avers, that neither the act of Congress commonly known as the interstate commerce act, nor any other law, authorizes the Interstate Commerce Commission, in a proceeding of the character heretofore referred to in this petition as depending before it between the Pennsylvania Paraffine Works and the Pennsylvania Railroad Company to make the order referred to and quoted above in this petition.

13. That the order of the Interstate Commerce Commission, entered in the proceeding heretofore referred to and quoted above in this petition, assumed to require your orator to furnish to the said The Pennsylvania Paraffine Works tank cars for the through transportation of shipments of petroleum in interstate commerce

not only when consigned to points on the line of railroad of this complainant, but also when consigned to points on the lines of railroad of other railroad companies; and the Pennsylvania Railroad

Company, complainant herein, is advised by counsel, and
6 therefore avers, that the said order is, in this regard, without lawful warrant and contrary to the fifth amendment to the Constitution of the United States.

14. That the order of the Interstate Commerce Commission, entered in the proceeding heretofore referred to and quoted above in this petition, assumes to require your orator to furnish to the said The Pennsylvania Paraffine Works tank cars for the through transportation of shipments of petroleum in interstate commerce when such cars happen to be on the railroad of this complainant, whether or not such tank cars are owned by this complainant or by other railroad companies or by private individuals; and the Pennsylvania Railroad Company, complainant herein, is advised by counsel, and therefore avers, that the said order is, in this regard, without lawful warrant and is contrary to the provisions of the interstate commerce act; and that obedience thereto on the part of this complainant would subject it to actions for damages on the part of the owners of such cars and to liability in such actions, and that the said order is therefore unlawful and contrary to the provisions of the fifth amendment to the Constitution of the United States.

15. That the order of the Interstate Commerce Commission, entered in the proceeding heretofore referred to and quoted above in this petition, deprives your orator of its property without due process of law in this, that the time allowed for compliance with the order of the said commission is insufficient to enable this complainant to build tank cars for the transportation in interstate commerce of the shipments of petroleum of the said The Pennsylvania Paraffine Works, and is insufficient to permit it to arrange to acquire such cars, or to obtain the use thereof from the present owners thereof on reasonable terms, since such owners are under no compulsion to
sell such cars or to rent them to this complainant upon reason-

7 able and just terms. The Pennsylvania Railroad Company, complainant herein, is accordingly advised by counsel, and therefore avers, that the order of the commission is, in this regard, without lawful warrant and is in violation of the fifth amendment to the Constitution of the United States.

16. That the Pennsylvania Railroad Company, complainant herein, is advised by counsel, and therefore avers, that the order of the Interstate Commerce Commission hereinbefore referred to and quoted in this petition is uncertain and indefinite and without warrant in law.

17. That the said unlawful order of the said Interstate Commerce Commission, made and promulgated as aforesaid in the assumed exercise of authority unlawfully claimed by the commission under

the said act, will, unless the same be enjoined and set aside, annulled, and suspended by your honorable court, subject your orator to a multiplicity of suits for heavy penalties and a multiplicity of suits for the enforcement of the said order under the provisions of the said act and will produce irreparable damage to your orator, the complainant herein.

18. Your orator further shows that if it should be required to comply with the said order even temporarily pending final adjudication thereof of its lawfulness your orator would be without means of reparation for the loss to which it would be thereby unlawfully subjected. In consideration whereof, for as much as your orator is remediless in the premises at or by the strict rule of common law, and is only relievable in a court of equity, where matters of this kind are properly cognizable and reviewable under the act heretofore mentioned, your orator prays that a preliminary or interlocutory order or injunction be entered restraining and suspending the order of the said Interstate Commerce Commission until the final determination of this cause, and that upon the final hearing of this
8 suit a decree be entered herein enjoining, setting aside, annulling, and suspending the said order of the Interstate Commerce Commission and enjoining the enforcement of the said order.

Your orator further prays that your honors will direct that a copy of this petition be forthwith served by a marshal or deputy marshal in the manner provided in the act of Congress to regulate commerce.

And your orator will ever pray, etc.

AVERY WOLF BICKLE,

THOMAS PATTERSON,

PATTERSON, CRAWFORD & MILLER,

Solicitors and Counsel for the

Pennsylvania Railroad Company.

9

COMMONWEALTH OF PENNSYLVANIA,

City of Philadelphia, ss:

Before me, the subscriber, a notary public in and for the county of Philadelphia, residing in the city of Philadelphia, personally appeared the undersigned, George D. Dixon, who, being duly sworn by me according to law, deposes and says that he is vice president of the Pennsylvania Railroad Company, the above complainant; that he has read the said petition; and that the same is true of his own knowledge except such matters as are therein stated on information and belief, and that as to such statements he believes it to be true.

GEO. D. DIXON.

Sworn to and subscribed before me this 30th day of June, A. D. 1915.

[SEAL.]

HENRY E. CAIN,
Notary Public.

Commission expires Feb'y 21, 1919.

10 Exhibit A. United States of America, Interstate Commerce Commission.

THE PENNSYLVANIA PARAFFINE WORKS

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

The petition of the above-named complainant, the Pennsylvania Paraffine Works, respectfully shows:

(1.) That the Pennsylvania Paraffine Works is a business corporation organized and created and existing under and pursuant to the laws and statutes of the State of Pennsylvania and has its office and principal place of business at and in the city of Titusville, county of Crawford, and State of Pennsylvania.

(2) That the complainant, the Pennsylvania Paraffine Works at Titusville, Pennsylvania, aforesaid, is and for the several years last past has been engaged in refining oil and the products thereof and refining for shipment and transportation about 300,000 gallons of refined oil and gasoline per month and also refines for shipment and transportation about 150,000 gallons of light and dark lubricating oil per month at its plant and refinery at Titusville, Pa., aforesaid, and expects so to continue to refine about 300,000 gallons of refined oil and gasoline and about 150,000 gallons of light and dark lubricating oil each and every month during the ensuing year and for each and every year thereafter for shipment; and that said company in its business of so shipping oil and gasoline as aforesaid ships and delivers the same at divers points and places throughout the United States and particularly in the States of Pennsylvania, New York, New Jersey, Ohio, Maryland, Illinois, Indiana, Michigan, and Delaware, as well as the Eastern and Southern States, some or all of them, and said company expects to be during all the ensuing year and for a long time thereafter engaged in interstate commerce business in so selling and delivering said products of said refinery as aforesaid.

11 (3) That the Pennsylvania Railroad Company is a transportation corporation duly organized and created under and pursuant to the laws of the State of Pennsylvania, and that the said Pennsylvania Railroad Company is and for many years last past has been and still is engaged, among other things, in transporting freight and passengers by railroad for hire during all said time, and has been and still is a common carrier engaged in transporting freight in the various States of the United States, and as such common carrier is and for a long time has been engaged in interstate commerce business throughout the United States, and as such common carrier during all the times herein mentioned received and delivered freight as a common carrier, and is still engaged as such common carrier in receiving and delivering freight for hire throughout the United States in said interstate commerce business as such common carrier,

and as such common carrier is subject to the provisions of the act to regulate commerce, approved February 4, 1887, and the acts amendatory thereof and supplementary thereto.

(4) Your complainant further shows that the said Pennsylvania Paraffine Works maintains switches and sidings in connection with the Pennsylvania Railroad, and that such sidings are connected with the trackage of said Pennsylvania Railroad Company, and that complainant has ample sidings and switches at and about its said plant at Titusville, Pa., aforesaid, on which the cars of the said Pennsylvania Railroad can be filled with the products of said refinery, as aforesaid, by running the same into said cars from the tanks of the said Pennsylvania Paraffine Company, and that said

12 Pennsylvania Paraffine Company has ample adequate and efficient appliances at said refinery to fill said cars from said tanks, and that said Pennsylvania Paraffine Works has ample sidings at its said plant for the storage of tank cars for its business, and that the lines and trackage of the said Pennsylvania Railroad Company run from and are maintained from said sidings aforesaid at Titusville through the various States of the United States wherein the said Pennsylvania Railroad Company so operates its lines and trackage aforesaid.

(5) That the Pennsylvania Railroad can, by reason of its location and trackage and on account of the location of the customers of complainant, better and more directly serve and deliver the products of your complainant's refinery to its said customers than any other transportation company or corporation for the reason that the lines, trackage, and railway of said Pennsylvania Railroad Company run and reach the several points and places where your complainant it requested to and does deliver its oils, gasoline, and the products of its refinery to its customers and purchasers of the products of said refinery. That with proper and efficient methods and fair service on the part of said railroad company, substantially, all the products of such refinery would and should be transported over the lines of said Pennsylvania Railroad Company.

(6) Your complainant further shows that it is the owner of a considerable number of tank cars, to wit, fifty tank cars each of which range from 5,500 to 8,000 and 10,000 gallons holding capacity, which tank cars are used for the transportation of oils and gasoline so manufactured by your complainant, aforesaid, in bulk. That by the regulations and practice of said Pennsylvania Railroad Company the wear and tear of said cars and the defects and breakage due to defects occurring while in use are repaired by Said Pennsylvania Railroad Company at the expense of complainant. That said railroad company by such regulations and practice agreed to make repairs for breakage occurring by rough or unusual handling, wrecks, and accidents for which the carrier is directly responsible. That such damage and injury to the cars of your complainant and the amount of such damages are ascertained by the Pennsylvania Railroad Company by the inspectors thereof.

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(7) Complainant further alleges that the defendant, the Pennsylvania Railroad Company, has violated the act to regulate commerce of the United States of America and the acts amendatory thereof and supplementary thereto in the following particulars: That the said Pennsylvania Railroad Company upon reasonable request wholly failed and neglected and refused to furnish cars, vehicles, and instrumentalities and facilities for the transportation, carriage, and shipment in bulk of the products of your complainant in failing and refusing to furnish and provide tank cars, vehicles with the instrumentalities and facilities in connection therewith, for the transportation of 300,000 gallons of refined oil and gasoline per month and to furnish and provide suitable tank cars and vehicles with the necessary and proper instrumentalities and facilities in connection therewith for the transportation in bulk in said tank cars of 150,000 gallons of light and dark lubricating oil during each and every month at its said plant at Titusville, aforesaid.

(8) Your complainant further alleges that said Pennsylvania Railroad Company has violated the act to regulate commerce aforesaid in that in the month of November, 1912, complainant caused notices in words and figures as follows, to wit:

"You will please take notice: That the Pennsylvania Paraffine Works, of Titusville, Pennsylvania, require a sufficient number of tank cars to ship 300,000 gallons of refined oil and gasoline per month and a sufficient number of tank cars to ship 150,000 gallons of light and dark lubricating oil per month from the plant of said Pennsylvania Paraffine Works at Titusville, aforesaid, during the ensuing year, and that such cars are needed for a proportionate daily shipment from said works during all of said time. And you are thereby notified that said Pennsylvania Paraffine Works demand that said tank cars be furnished on the siding and switches of said company. Dated November 11, 1912. The Pennsylvania Paraffine Works, by Wm. Muir, president. To the Pennsylvania Railroad Company."

14 to be duly and personally served upon R. M. Patterson, the superintendent of the freight transportation department of the Pennsylvania Railroad Company at the Broad Street Station of said Pennsylvania Railroad Company in the city of Philadelphia and State of Pennsylvania, and on J. G. Rodgers, the general superintendent of the Buffalo and Allegheny division of said railroad company, and on George B. Beale, superintendent of the Buffalo division of the Buffalo and Allegheny Valley division of said railroad company; also on W. C. Katzmaier, the agent of the Pennsylvania Railroad Company at Titusville, Pennsylvania, and a similar notice delivered personally to S. C. Long, general manager of the Pennsylvania Railroad Company at his office in the city of Philadelphia, Pennsylvania.

(9) That your complainant further shows that heretofore, to wit, the 18th day of December, 1912, the said S. C. Long, general manager of the said Pennsylvania Railroad Company, answering the de-

mand and request of your complainant to furnish tank cars as aforesaid and in conformity with said notice, refused to so furnish or increase the tank cars required by your complainant in words and figures as follows, to wit:

"We beg to say that the railroad company is not prepared to increase its tank-car equipment but is prepared to transport the commodities in question when properly contained in barrels or other similar retainers at rates that are fair, reasonable, and nondiscriminatory. Yours truly, S. C. Long, General Manager."

15 (10) Your complainant further shows that said Pennsylvania Railroad Company has during the past several years and now is holding itself out to the public as ready and willing to carry goods and commodities for all persons, indifferently, for hire as such common carrier, not only in the State of Pennsylvania but elsewhere throughout the United States of America on its established routes, and holds itself out and advertises and it is part of its business and long has been to transport oils and gasoline such as is produced and refined by your petitioner in bulk for hire over its said road.

(11) Your complainant further alleges for the purpose of showing that said defendant is violating the act to regulate commerce, that it is necessary that such refined oils and gasoline and light and dark lubricating oils so produced and manufactured at said refinery be transported in tank cars in bulk; that the expense of transporting such products in barrels and by other similar means or in retainers or containers such as is referred to in the letter and correspondence of the general manager of the Pennsylvania Railroad Company increases the expense of said transportation to such an extent that such expense is destructive of the business of the shipping of said commodities, and that in case the transportation of said oils and gasoline is made in wooden or iron barrels then such barrels weigh nearly twenty-five per cent of the package when filled, hence adds 25% to the transportation charges. The cost of the package adds on the average in excess of 25% of the value of the commodity contained in it. The cost in time and in handling is greatly in excess of the cost of loading and unloading such commodities in bulk, and leakage and wastage is much greater in barrels and is minimized if transported in tank cars.

(12) Your complainant further alleges that the defendant, the Pennsylvania Railroad Company, has further violated the act to regulate commerce as follows, to wit: That the use of tank cars for the transportation of oil and the products of said refinery in bulk has become and now is an actual necessity, without which the refiners of crude oil, to wit, your complainant, could not
16 carry on business at a profit; that tank cars have been in use for a period of more than twenty-five years for transporting oils and gasoline and the products of such refining business and have been accepted by the Pennsylvania Railroad Company and

by carriers generally when tendered for such transportation and commercial conditions throughout the country have adjusted themselves to the transportation and delivery of oils and gasoline in bulk. Without the use of such tank cars by your complainant and others similarly engaged in refining crude oil, the cost of such refined products would be largely and vastly increased to the public and users thereof, and that the use of said tank cars has become an actual necessity and are in common use, and the transportation of said oils and gasoline by tank cars of the sizes hereinbefore described has become and is the common, usual, and ordinary method of transportation now in use and is so recognized and adopted by the Pennsylvania Railroad as well as by other carriers of said commodities in both their interstate and intrastate and local business, and that the Pennsylvania Railroad Company now owns about 500 tank cars and which it uses in part for the transportation of refined oils and gasoline in its business as such carrier, but that such number of cars and the cars so in use for the transportation of said commodities is wholly inadequate and insufficient for the business of transporting oils and gasoline ordinarily produced, and transported by the Pennsylvania Railroad Company; and by reason of the violation, refusal, and neglect of said Pennsylvania Railroad Company to so furnish tank cars provided with the usual and ordinary instrumentalities and facilities for shipment and carriage of oil it became necessary for the refiners and transporters of oils and gasoline for shipment, and especially of your complainant, to purchase and procure at great expense a large number of tank cars and other vehicles and instrumentalities for the shipment and transportation of their oils and gasoline, although your complainant alleges it is and

17 during all of said times heretofore mentioned was and still is the duty of the said Pennsylvania Railroad Company, as such common carrier so engaged in interstate commerce business, to furnish and provide your complainant and others similarly situated with proper and sufficient tank cars and other vehicles and all instrumentalities and facilities for the shipment of said oils and gasoline so produced and manufactured by your complainant and the whole thereof, but said Pennsylvania Railroad Company has persistently neglected and refuses so to do, and by means whereof and on account of said refusal to so furnish said cars, vehicles, and instrumentalities as aforesaid your complainant has suffered great damage, to wit, in the sum of \$50,000.00 therefor.

(13) Your complainant further shows that it requires for the transportation of its products from sixty to one hundred cars and upwards per month during the past several years for the transportation of said oils and gasoline as aforesaid, so manufactured and produced by your complainant at its said refinery at Titusville, aforesaid, depending upon the capacity of said cars, to wit, one hundred cars of 5,500 gallons capacity or sixty cars of 10,000 gallons capacity, and expects and intends to require a like number of cars

during the ensuing year and during a long time thereafter, and your complainant requests and demands of said Pennsylvania Railroad Company to furnish such tank cars in conformity to such needs and requirements, but said Pennsylvania Railroad Company wholly refuses so to do and has continuously and persistently refused so to do during such time, and has furnished not to exceed several cars per month during the past seven months to the great and lasting damage and injury to your complainant. That your complainant is not engaged in the business of a common carrier in transporting freight for hire in either local or interstate commerce, and your complainant was compelled to and did purchase and obtain at great

expense a large number of tank cars, to wit, 50 tank cars, for 18 the transportation of the products of such refinery, and has been, on account of such failure and refusal of said Pennsylvania Railroad Company to furnish and provide such cars in sufficient numbers, obliged to provide, purchase, and obtain such tank cars to deliver the products of such refinery over said defendant railway company's roads as aforesaid in its own cars and vehicles, and when the said cars have been so shipped and used in the business of so transporting said oils and gasoline as aforesaid, the inspection by the Pennsylvania Railroad Company, as heretofore set forth, has been so expensive and unfair to your complainant that it unnecessarily and largely increased the cost of transportation thereof as hereinafter set forth.

(14) Your complainant further alleges that the defendant, the Pennsylvania Railroad Company, has further violated the act to regulate commerce in that the said railroad company in so transporting the products of said refinery over its said railroad in the cars of your complainant, and in returning said cars to complainant, that said cars were damaged, injured, broken, and partially destroyed at divers times during the past several years, and which damage, injury, breakage, and destruction was not due to the ordinary wear and tear of said cars but was caused by rough and unusual handling, wrecks, etc., for which said railroad company was directly responsible, yet the said Pennsylvania Railroad Company by its inspection and determination of the damages of your complainant by said railroad company has during all of said time been so uniformly unfair and unreasonable prejudicial to the interests of your complainant during the past several years that said cars of your complainant were broken and greatly damaged by such rough handling, wrecks, and accidents occurring without any act or occasion of your complainant, the inspection of such carrier as a general rule was unfairly ascertained and determined that such damage, breakage, and injury to said cars was in no way attributable to the said

19 Pennsylvania Railroad Company but was chargeable to your complainant, and that such charges and inspection resulted in the destruction of such tank cars and large expense to your complainant for repairs, to be borne by your complainant and not

by the carrier, the Pennsylvania Railroad Company, which largely, unduly, and uniformly increased the cost and expense of transporting the products of such refinery, and that as a result of such unfair and unreasonable inspection and determination by said defendant's inspectors, the cost of the products of your complainant's refinery was unduly and unfairly increased thereby.

(15) Your complainant further charges that the defendant violated the act to regulate commerce in the following particulars: That the said defendant during the last several years and divers times therein, to wit, several times during each month during all of said time, unduly and unnecessarily delayed the transporting of said tank cars of your complainant in the delivery thereof from the place of shipment at Titusville aforesaid, and great delays were occasioned thereby, to the damage and detriment of your complainant, and your complainant on account thereof was unable to sufficiently or properly utilize its tank cars for the transportation of its oils and gasoline so refined at its said refinery, and such delay resulted in great injury, detriment, and damage to your complainant, and such delays were also vexatious and inimical to the success of your complainant's business. That by reason and on account of such delay in the transportation of said cars and the products as aforesaid and the return of said empty cars, and by reason of such unfair and unreasonable inspection as aforesaid, and said unreasonable and prejudicial determination of the damages so sustained by injury to the cars of your complainant as aforesaid, your complainant has been during the past several years and upwards compelled to ship and transport a part of the products of said refinery by and through other transportation lines by indirect and circuitous routes, to wit, by and over the Dunkirk and Allegheny Valley Railroad Company, and also by the New

20 York Central, and which last-named railroad company could not so directly reach or serve the customers of said refinery of your complainant, and the said lines of railways last above set forth do not reach or run to the places where your complainant desires to deliver the products of said refinery, and the said railroad companies last above named run through divers other States besides the State of Pennsylvania, but the inspection and adjustment of damages to the tank cars of your complainant was more uniformly and honestly made, and the delivery of oils and gasoline was more rapidly made by said railroad companies last above named, to wit, the Dunkirk and Allegheny Valley Railroad Company and the New York Central lines, and the tank cars of your complainant were by said last-named companies returned in due time and without any unnecessary delay with but few exceptions.

(16) Your complainant further alleges that it is the duty and obligation of the said Pennsylvania Railroad Company as such common carrier, as your complainant is informed and believes, to furnish and provide it with suitable, efficient, and ample vehicles, with the necessary instrumentalities and facilities therefor, for the transportation

of the products of your complainant's refinery as aforesaid in conformity with the demands so heretofore made to said railroad company to furnish such transportation to it therefor in the amounts hereinbefore set forth and contained in said notices so served on said railroad company, but said railroad company has wholly failed and neglected to perform said duties and obligations so resting upon it under and pursuant to the laws and statutes of the United States, and particularly of the act to regulate commerce and the various sections thereof.

(17) That no previous application has been made for an order or direction requiring the said Pennsylvania Railroad Company to furnish and provide such vehicles, instrumentalities, and facilities as aforesaid to your complainant.

Wherefore your complainant prays that the defendant may be required to answer the charges herein, and that after due hearing and investigation an order may be made commanding the defendant to cease and desist the said violations of the act to regulate commerce, and that the said defendant shall be required to furnish the necessary transportation pursuant to the prayer of your complainant herein and in conformity to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, and for such other and further order as the commission may deem necessary in the premises, and your petitioner will forever pray, etc.

Dated at Titusville, county of Crawford, State of Pennsylvania, on the twentieth day of February, 1913.

PENNSYLVANIA PARAFFINE WORKS,
By WM. MUIR, *President*.
By GEORGE E. SPRING,
Its Attorney; Office and P. O.
Address at Franklinville, New York.

22 STATE OF PENNSYLVANIA,
County of Crawford, City of Titusville, ss:

William Muir, being duly sworn, deposes and says that he is the president of the Pennsylvania Paraffine Works named in the foregoing petition subscribed by him: that he knows the contents thereof, and the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

WM MUIR.

Sworn and subscribed before me this twentieth day of February, 1913.

HARRY GERSON,
Notary Public.

Commission expires January 21, 1919.

23 Exhibit B. Before the Interstate Commerce Commission.

THE PENNSYLVANIA PARAFFINE WORKS	} Docket No. 5574.
^{vs.} THE PENNSYLVANIA RAILROAD COMPANY.	

Defendant's answer.

The above-named defendant for answer to the complaint filed in this proceeding respectfully states:

I. This defendant is without information sufficient to enable it to admit or deny the averments of paragraph one of the complaint and, accordingly, prays that so far as the same be deemed material complainant be required to make due proof thereof.

II. This defendant admits that the complainant has been and is engaged in refining oil and the products thereof at Titusville, Pennsylvania, and that it has shipped and continues to ship its products in interstate commerce, but this defendant is without sufficient information to enable it to admit or deny the averments of paragraph two as to the volume of complainant's business, and prays, therefore, that so far as the same be deemed material, complainant be required to make due proof thereof.

III. This defendant admits that it is a common carrier, engaged in part in interstate commerce, and that as to such commerce it is subject to the act to regulate commerce approved February 5th, 1887, and the acts amendatory thereof and supplementary thereto, so far as the same are constitutional and enforceable.

24 IV. This defendant admits that it has siding connections at Titusville, Pennsylvania, with the works of the complainant, but as to whether these sidings are ample for the purpose of the complainant referred to in paragraph four of the complaint, and as to whether the complainant has ample, adequate, and sufficient appliances at its refinery to fill cars from its tanks, this defendant is without sufficient information either to admit or deny, and accordingly prays that, so far as these facts may be deemed material, complainant may be required to make due proof thereof.

V. This defendant is not disposed to deny that it can better and more directly serve and deliver the products of the complainant's refinery than can other transportation companies, but it is unable to make any averment in regard to this allegation of paragraph five of the complaint since it is without information as to the facilities of its competitors, and it is therefore unable to make comparisons. It denies that it has failed to provide proper and efficient methods and fair service, but, on the contrary, avers that it has performed fully, and continues to perform, its legal duties to the complainant in this regard.

VI. This defendant admits that the complainant is the owner of certain tank cars, and that these cars are from time to time transported over the lines of this defendant, but it is without information to enable it to admit or deny the allegations of paragraph six of the complaint with reference to the precise number of these cars and their respective capacities. Repairs to these cars which become necessary by wear and tear, or by defects and breakage, are paid for in some instances by the railroad company and in some instances by the complainant, the cause of the necessity for the repairs determining the party responsible for the expense thereof. The averments of paragraph six of the complaint with reference to the parties responsible for these repairs are not entirely accurate, but are substantially correct.

25 VII. This defendant denies that it has wholly failed and neglected and refused to furnish cars to the complainant for the shipment of its products in bulk, and denies further that it has in any regard violated its legal obligations to the complainant in this respect.

VIII. This defendant denies that it has violated the act to regulate commerce as alleged in paragraph eight of the complaint and avers on the contrary that the allegation that it did so by reason of the service on it by the complainant of certain notices referred to in the said paragraph eight is frivolous and immaterial.

IX. This defendant admits that its general manager, S. C. Long, under date of December 18th, 1912, wrote the complainant in the manner and form referred to in paragraph nine.

X. The averments of paragraph ten of the complaint are admitted, subject to the qualification of rule 29 of the official classification No. 39, a portion of which reads as follows:

"In providing ratings in this classification for articles in tank cars, the carriers whose tariffs are covered by this classification do not assume any obligation to furnish tank cars."

XI. This defendant denies that it is violating the act to regulate commerce as alleged in paragraph eleven of the complaint. With regard to the remaining averments of paragraph eleven, it is without sufficient information to enable it to admit or deny the same and accordingly prays that due proof thereof be made by the complainant.

26 XII. This defendant admits that it owns approximately five hundred tank cars, but it denies that it is under any obligation to increase this class of its equipment or that it has failed in its legal duties under the act to regulate commerce. It denies that it has failed to furnish adequate facilities as required by the act to regulate commerce, but on the contrary avers that it has fully performed its legal duties in this regard. It denies that the complainant is entitled to recover any damages from it on account of the matters alleged in this complaint. With respect to the other averments contained in paragraph twelve of the complaint,

this defendant is without sufficient information to enable it either to admit or deny the same and accordingly prays that so far as the same be deemed material due proof thereof be required.

XIII. This defendant is without sufficient information to enable it either to admit or deny the extent of the volume of the complainant's business as alleged in paragraph thirteen of the complaint. It denies that it has failed to furnish adequate facilities for the transportation of such portion of the complainant's traffic as has been duly offered to it for transportation. This defendant denies further that the complainant was compelled to purchase any tank-car equipment because of any failure on the part of it, the defendant, to fully perform its legal duty under the act to regulate commerce. It denies further that the inspection established by it, the Pennsylvania Railroad Company, has been so expensive or unfair to the complainant as unnecessarily to increase the cost of transportation to the complainant.

XIV. This defendant denies that it has unfairly inspected the cars owned by the complainant and denies further that it has made unfair charges for the repairs necessary thereto. It denies further that there has been any unlawful action on its part which has unduly increased the cost of transportation to the complainant.

XV. This defendant denies that it unreasonably or unduly delayed the transportation of the complainant's shipments and denies further that it has subjected them or does subject them to any unfair or unreasonable inspection or imposes upon the complainant any unjust charges for necessary repairs. It is without information as to the shipments alleged to have been made by the complainant over the Dunkirk & Allegheny Valley Railroad and also over the New York Central & Hudson River Railroad, and consequently it is unable to admit or deny the averments of the complaint with
27 respect to the transportation service of these two companies. It accordingly prays that if these allegations be deemed material, due proof thereof be required.

XVI. This defendant denies that it has failed to comply with the obligations imposed upon it by the interstate commerce act with respect to the furnishing of adequate facilities for the transportation of interstate freight but on the contrary avers that it has fully performed its duties in the premises.

Wherefore, this defendant prays that the complaint filed in this proceeding be dismissed.

(Signed)

THE PENNSYLVANIA RAILROAD COMPANY,
By C. M. SHEAFFER,
General Superintendent of Transportation.

HENRY WOLF BIKLÉ,

GEORGE STUART PATTERSON,

Of Counsel.

18 UNITED STATES VS. PENNSYLVANIA RAILROAD COMPANY.

28 Exhibit C. Before the Interstate Commerce Commission.

PENNSYLVANIA PARAFFINE WORKS
vs.
THE PENNSYLVANIA RAILROAD COMPANY. } Docket No. 5574.

Motion to dismiss for want of jurisdiction.

Comes now the Pennsylvania Railroad Company, the defendant above named, and respectfully moved the Interstate Commerce Commission to dismiss the complaint filed in this proceeding for the following reason:

The Interstate Commerce Commission is without jurisdiction to entertain this complaint or to grant the relief prayed for.

(Signed) HENRY WOLF BIKLÉ,

Attorney for the Pennsylvania Railroad Company.

PHILADELPHIA, PA., October 20th, 1913.

29 Exhibit D. Interstate Commerce Commission.

PENNSYLVANIA PARAFFINE WORKS
v.
PENNSYLVANIA RAILROAD COMPANY. } No. 5574.

CREW-LEVICK COMPANY
v.
SAME. } No. 5574 (Sub-No. 1).

Submitted March 11, 1914. Decided May 11, 1915.

1. This commission has the power to require carriers to furnish all necessary equipment, both ordinary and special, upon reasonable request. *Vulcan Coal & Mining Co. v. I. C. R. R. Co.*, 33 I. C. C., 52.
2. The question of what is a reasonably adequate car supply is an administrative one of which this commission alone can take original jurisdiction.
3. A shipper's request for cars especially suited for the transportation of his products would not be reasonable if the cars must be prepared for shipment in a manner which is peculiarly within the technical knowledge of men connected with that industry, or if the movement of the commodity is a dangerous operation which can be safely performed only by men engaged in its production.
4. The shipment of petroleum products in tank cars does not call for such technical knowledge as would render unreasonable complainants' request that defendant furnish these cars.

5. From the standpoint of economy to the shipper, to the consumer, and the railroad, tank cars are the only proper cars to use in the shipment of petroleum.
6. One of the tests to be relied upon in determining the reasonableness of a shipper's request for cars is to be found in the volume of his shipments in the past, due allowance being made for the growth of his business.
7. All cars used by carriers, whether they be owned by the carriers themselves or leased from private car lines or from shippers, must be distributed without discrimination.
8. Whatever transportation service or facility the law requires a carrier to supply, it has a right to furnish. *Atchison Ry. Co. v. U. S.*, 232 U. S., 199; *Arlington Heights Fruit Exchange v. S. P. Co.*, 20 I. C. C., 106.
9. Defendant required to furnish a sufficient number of tank cars.
G. E. Spring and C. D. Chamberlin for complainants.
Henry Wolf Bickl  for Pennsylvania Railroad Company.

REPORT OF THE COMMISSION.

MEYER, *Commissioner*:

These complaints, which are identical, are brought against the single defendant, the Pennsylvania Railroad Company. They
 30 allege that the defendant has refused to furnish tank cars upon the reasonable request of complainants, in violation of the act to regulate commerce. They also allege that complainants have been damaged by unreasonable delays in the return empty of complainants' privately owned tank cars, and by defendant's unfair determination of damages to such cars, outside of ordinary wear and tear. Complainants pray for an order requiring defendant to furnish cars, and for such further order as the commission may deem necessary.

Complainants are refiners of crude oil. The Pennsylvania Paraffine Works has its office and refinery at Titusville, Pa., and the Crew-Levick Company operates the Glade Oil Works at Warren, Pa. Both complainants are corporations, organized under the laws of Pennsylvania, and have been engaged in refining oil for over 20 years. For the past two years the Pennsylvania Paraffine Works has been refining about 20,000 barrels of crude oil per month and the Glade Oil Works from 15,000 to 16,000 barrels per month. During the 10 months of 1913 for which results are shown in tables submitted by complainants the shipments of the Pennsylvania Paraffine Works averaged over 750,000 gallons and the shipments of the Glade Oil Works over 500,000 gallons per month. Of the shipments made by the Pennsylvania Paraffine Works 91 per cent moved in tank cars, 1½ per cent in barrels loaded in cars other than tank cars, and 7½ per cent in pipe lines, while of the shipments made by the Glade Oil Works 86.8 per cent moved in tank cars, 4.7 per cent in barrels, and 8.5 per cent in pipe lines.

Approximately 250,000,000 barrels of crude oil are produced annually in the United States, and there are in the neighborhood of 100 companies engaged in refining oil. For a long time the bulk of the refined product has been shipped in tank cars, and at present 91 per cent of the refined oil produced in this country is transported in this manner. It was testified that defendant has been using such cars for the shipment of oil for over 25 years.

Complainants have ample sidings and connections with defendant's railway both at Titusville and at Warren for the delivery by defendant and the loading of tank cars. The tank cars now in common use for the transportation of oil have a capacity of from 6,000 to 12,000 gallons each. The cars are so constructed that they may be rapidly loaded at the refinery, and jobbers and dealers in the refined product throughout the country have the proper and necessary facilities for unloading tank cars by gravity at their various stations. Even the country grocer has his tank, which is filled from tank wagons. The tank wagons are filled from the oil dealer's storage tank, which in turn is filled from tank cars.

The only other method of transporting oil by rail is in barrels or similar containers loaded in box cars. However, the cost to
 31 the purchaser of oil transported in barrels is from $3\frac{1}{2}$ to $3\frac{3}{4}$ cents per gallon above the cost when transported in tank cars. This higher cost is due to the additional weight upon which freight charges must be paid, depreciation in value of the barrels when used, greater waste than when transported in tank cars, and additional expense of handling and delivering. The freight charges alone, it was testified, are increased approximately 25 per cent by the added weight of the barrel. The price of lubricating oil is from $2\frac{1}{2}$ to 22 cents per gallon f. o. b. cars at complainants' works; that of burning oil from $4\frac{1}{2}$ to $5\frac{3}{4}$ cents per gallon, and of gasoline from $9\frac{1}{2}$ to $17\frac{1}{2}$ cents. It is evident that the addition of $3\frac{1}{2}$ cents per gallon to the cost of oil when transported in barrels makes that method of transportation prohibitive and that the refusal of the railroads to furnish an adequate supply of tank cars would tend to drive out of business refiners who are unable to supply themselves with enough tank cars to move their products. Even witnesses who appeared in defendant's behalf admitted that tank cars are an absolute necessity for the transportation of refined products, and that their use effects an economic gain. Moreover, shippers are required to pay freight on the full shell capacity of tank cars, and the carload revenue derived from the movement of products in tank cars compares favorably with the revenue derived from movements in other cars. The transportation of oil in tank cars is desirable also from a purely transportation standpoint.

The bulk of the movement of refined oil is in tank cars owned by the shippers. In 1887 the Pennsylvania Railroad acquired 1,308 tank cars, some of which have subsequently been sold to independent refineries. Defendant now owns 499 tank cars, all that remain of those purchased in 1887 and 482 of which are furnished to shippers.

of oil located on its lines. The other railroads east of the Mississippi River own, in the aggregate, only 303 tank cars. The privately owned tank cars east of the Mississippi aggregate about 27,700, and the total number of tank cars owned in the United States was given as approximately 40,000.

At present the Pennsylvania Paraffine Company owns 54 tank cars and the Crew-Levick Company 57 tank cars. Complainants allege that these cars, together with the cars furnished by defendant, are not sufficient to meet the requirements of their business. It was testified that during the past five or six years complainants have made daily inquiry for the delivery of cars to their refineries and that a formal order for cars has constantly been on file in defendant's offices at Titusville and at Warren. On March 9, 1910, in a letter to defendant's superintendent at Buffalo, the Pennsylvania Paraffine Company demanded that in the future defendant furnish the necessary tank cars for the transportation of complainants' product.

32 On March 30 the defendant's superintendent replied that complainants' request for tank cars actually needed for intended shipments would receive due consideration and would be complied with to such extent as the tank-car equipment of the company would permit. In fact, however, defendant did not comply with complainants' request further than to furnish cars in about the same proportion as before. Subsequent to making this request the Pennsylvania Paraffine Company purchased five and the Crew-Levick Company two additional tank cars, the former as late as September, 1913. On November 11, 1912, shortly prior to bringing this complaint, each complainant served defendant with a formal notice requesting it to furnish a sufficient number of tank cars to ship, respectively, 450,000 gallons of oil per month from the Pennsylvania Paraffine Company's refinery at Titusville and 600,000 gallons per month from the Glade Oil Works at Warren. To this request defendant's answer, through its general manager, was as follows:

"We beg to say that the railroad company is not prepared to increase its present tank-car equipment, but is prepared to transport the commodity, when properly contained in barrels or other similar containers, at rates that are fair and reasonable and nondiscriminatory."

Thereafter complainants brought this action.

Complainants' customers are in the main located in official classification territory. Complainants assert that defendant's line is the most direct route to nearly all of the destinations to which they are accustomed to ship, and that with fair service on defendant's part substantially all of the products of complainants' refineries would be transported over its line.

Complainants have of late been making a large part of their shipments over the Dunkirk, Allegheny Valley & Pittsburgh Railroad and the New York Central lines, although these carriers have no tank cars of their own and their lines form, in many instances, a

much more circuitous route that the lines of the Pennsylvania Railroad. Complainants give as their reason for preferring the indirect route of the New York Central lines, unfair settlement by the Pennsylvania of damages to complainants' private cars, frequent and unnecessary delay in delivering their shipments and returning empties, and the failure of defendant to report the location of complainants' cars. As regards the last point, the testimony shows that defendant is now giving the service desired, but as a result of the others complainants allege that they have suffered great pecuniary loss. It is stated that the service of the New York Central lines is much better in these respects. Complainants allege that the private ownership of cars by shippers is bound to result in the unfair and unjust determination of damages to shippers' cars occasioned by rough usage, wrecks, and accidents which by the master car builders' rules
33 should be borne by the railroad, and in long and unnecessary delays in the return of empties.

Complainants state further that the cost of maintaining their privately owned tank cars far exceeds the rentals received from the railroads. They are also required in some States to pay taxes upon the cars they own. These expenses would not fall upon the shipper if the railroads were required to furnish the necessary cars. Complainants state that the reason they originally provided themselves with tank cars of their own was that at that time the railroads could not be compelled to furnish this equipment, but that now, under the amended law, this duty has been specifically declared, and this commission has been given the power to enforce it.

While complainants' prayer is that defendant be required to furnish all the equipment needed for the transportation of their products, they allege that even if their own cars be taken into consideration the additional equipment has not been sufficient to meet the requirements of their business.

Defendant emphatically denies this to have been the case and contends that in the past three years it has furnished complainants with all the tank cars to which they were entitled. While exhibits introduced in evidence indicate that during the past few years defendant has supplied practically all the cars ordered by complainants, there have at times been long delays in filling the orders. The most extreme example of delay was in the case of an order of the Pennsylvania Paraffine Company for 15 tank cars on October 2, 1912, which was filled by the delivery of 1 car on each of the following dates: October 4, 5, 8, 14, 15, and 16, 1912; November 4, 5, and 12, 1912; December 10, 21, and 31, 1912; January 16, 1913; and March 10 and 11, 1913. A delay of over five months in filling an order for cars obviously shows that at least during that time defendant's equipment did not meet the reasonable demands of complainants. The evidence shows orders for cars to have frequently been given in excess of complainants' immediate needs, in expectation that defendant would fill them as rapidly as possible in the ordinary

course of its business. Defendant also showed that tank cars furnished complainants have at times been refused, although it does not appear that such refusal was always made because complainants at the time had no further shipments to make. Although the testimony does not show that the tank cars furnished by defendant plus complainants' privately owned cars have at all times been insufficient to meet the requirements of complainants' business, it can nevertheless be safely stated that at times this has been the case.

It is plain that the cars furnished by defendant constitute but a small proportion of those required for the transportation of complainants' products. During the 12 months from November,

34 1912, to October, 1913, inclusive, the Pennsylvania Paraffine

Company shipped in all 1,161 carloads of refined products, of which 821 were shipped over the New York Central lines and 340 over the Pennsylvania Railroad. Of the total 998 carloads an average of $83\frac{1}{4}$ carloads per month was shipped in complainants' private cars, and 163 carloads, an average of $13\frac{1}{2}$ per month, in tank cars furnished by the Pennsylvania Railroad. During the same period the Glade Oil Works shipped 992 carloads, 535 over the New York Central lines and 457 over the Pennsylvania Railroad. Of these, 844 carloads, or an average of $70\frac{1}{4}$ per month, were shipped in tank cars belonging to the Crew-Levick Company, and 148 carloads, an average of $12\frac{1}{4}$ per month, in Pennsylvania Railroad Company cars. It is obvious that if defendant is excused from its obligation to provide the equipment necessary to move complainants' products by reason of complainants having in the past provided cars of their own, complainants would always be compelled to supply whatever additional cars were from time to time needed to take care of increases in their business, even though complainants no longer desired to maintain cars of their own. Defendant has refused to increase its supply of tank cars. The question to be decided is not whether the cars supplied by defendant together with those owned by complainants are sufficient to meet complainants' demands, but rather whether complainants may retire from the business of furnishing tank cars for the transportation of oil and henceforth rely entirely upon the railroads to provide this equipment, or whether complainants must in the future continue to take care of the increasing demands of their business by buying additional tank cars.

Defendant argues that the act to regulate commerce neither imposes upon carriers the obligation to buy additional tank cars nor invests the commission with power to require the purchase of additional tank cars.

For the jurisdiction of the commission over the present controversy, complainants rely upon the following portions of the act to regulate commerce as amended in 1906 and 1910. Section 1 of the act provides that—

“ * * * the term ‘transportation’ shall include cars and other vehicles and all instrumentalities and facilities of shipment or car-

riage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, * * *."

Section 12 of the act provides:

"* * * the commission is hereby authorized and required to execute and enforce the provisions of this act * * *."

and section 15 provides:

35 "That whenever, after full hearing upon a complaint made as provided in section 13 of this act, or after full hearing under an order for investigation and hearing made by the commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

The provisions of section 1 quoted above were inserted by the amendment of 1906; those of section 12 were added by the amendment of 1889; and section 15 was given its present form by the amendment of 1910, having previously been amended in 1906. Attention is called to these amendments because under the act, as originally passed, the commission did not have jurisdiction to require carriers to provide proper and adequate car equipment. See *Field v. L. S. & M. S. Ry. Co.*, 2 I. C. C., 67; *Rice v. C., W. & B. Ry. Co.*, 3 I. C. C., 193; *Re Transportation, etc.*, of Fruit, 10 I. C. C., 360.

The question of the commission's jurisdiction under the amended law was not brought before us until very recently. In *Vulcan Coal*

& Mining Co. v. I. C. R. R. Co., 33 I. C. C., 52, we were asked to award damages due to a carrier's alleged failure to supply cars to certain coal mines upon reasonable request. The defendant in that case also denied the commission's jurisdiction. We held that the question presented was properly before us on the ground that the determination of damages necessitated the prior determination of the extent to which defendant failed to comply with the duty it owed complainants to furnish cars upon reasonable request therefor, which we held to be an administrative question of which this commission alone can take original jurisdiction.

Defendant's first argument is that it was not the intention of Congress in passing the act to regulate commerce and amendments thereto to forbid the operation of private car lines or the ownership of cars by shippers.

36 Defendant first calls attention to the fact that at the time of the consideration of the amendment, the private ownership of railroad cars, including tank cars used in the transportation of oil, had continued for many years and was well known to the public, to the commission, and to Congress. Moreover, in the hearings held during 1905 and 1906 with reference to the proposed amendments to the act, this subject was brought to the direct attention of the Senate Committee on Interstate Commerce by many witnesses. Many cases of discrimination and rebates of that time occurred in connection with private car lines, and some shippers went so far as to demand that the act be so amended as to "forbid all carriers hauling cars carrying freight of any and every description that are not owned and controlled by such carriers themselves or by other carriers, bona fide such, and not created or existing for any other purpose."

After quoting several excerpts from the debates in Congress on the amendment of 1906, defendant argues that if Congress had intended to require the railroads to take over the privately owned cars or to confer upon the commission power to promulgate such a requirement it is inconceivable that the long debate on this amendment should disclose no intimation of this purpose. The following quotation from defendant's brief clearly shows the position taken:

"In view of the prevalence of the private ownership of cars, and in the light of the foregoing evidence with reference to the proceedings before the Senate committee and in Congress, it is impossible to believe that the Hepburn amendment was intended to change the degree of the obligation of the carriers with respect to furnishing the equipment for the transportation of commodities which were partly or largely transported in privately owned cars of a special description. Certainly, if the Congress of the United States had intended any change of such profound magnitude, and had intended to endow the commission with a power which the commission had already decided it did not have, the provisions to this end would have been much more specific and definite than the provisions on which the complainants rely."

Defendant's argument is based upon the supposition that the interpretation which complainants seek to place upon the provisions of the act under discussion, by which the jurisdiction of the commission in the present case is sought to be upheld, would require the railroads to take over the privately owned cars or confer upon the commission power to promulgate such a requirement. This, however, would not necessarily be the case. Section 1 of the act provides that it shall be the duty of every carrier subject to the provisions of the act "to provide and furnish" transportation, including cars, upon reasonable request therefor. This does not require the carriers' ownership of cars, but places upon them the duty to provide cars, which may be cars of their own or cars which they have secured in some other manner. The carriers, subject to the act, are to
37 obtain and have ready for future use "all cars and other vehicles and all instrumentalities and facilities of shipment or carriage," and furnish the same upon reasonable request. The power of the commission to require the carriers to comply with their duty is subject only to the proviso that the request for "cars and other vehicles" and the "instrumentalities" and "facilities" of transportation shall be reasonable. Whether or not a particular request is reasonable is a matter for this commission to decide in each particular case.

Defendant calls attention to a provision of its charter whereby it is required to permit its rails to be used as a public highway for the movement of privately owned cars. *Boyle v. P. & R. Ry Co.*, 54 Pa., 310; *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I. C. C., 356. In the light of what has been said above, it is evident that this provision of defendant's charter in no way conflicts with granting the relief prayed for.

It is further argued by the defendant that the requirement of section 1 to furnish transportation upon reasonable request was intended to transmute into an obligation under Federal law the common-law obligation of the carrier in this regard, and it is stated that there never was an obligation at the common law to supply a vehicle of a particular form or description when such form or description had no reference to the safety of transportation. Defendant states that so long as there is no unreasonableness or discrimination in the rates and so long as the carrier's equipment is adapted to the safe transportation of the goods intrusted to it, there is nothing in section 1 which in any way restricts the right of the carrier to choose and select the vehicle of transportation which it regards most satisfactory for the conduct of its business.

As bearing upon this point, it should first be stated that defendant holds itself out to transport oil in bulk. It not only publishes rates for the transportation of oil in tank cars, but owns tank cars and supplies shippers with them. It leases cars owned by companies engaged in refining oil and transports their products in those cars at the rates it publishes for the movement by rail of oil in tank cars. It certainly can not be contended that the transportation by rail of oil

in bulk could be attempted safely in any equipment other than tank cars.

Whatever the obligation of the carriers may have been under the common law, the requirements of the act are plainly more comprehensive than defendant contends. It is, of course, plain that the extent of defendant's obligation at common law is not determinative of its extent under the statute.

However, in further support of its argument that the requirements of section 1 to furnish transportation upon reasonable request were merely intended to transmute into an obligation under federal law the common-law obligation of the carrier, defendant calls attention to the safety-appliance acts, which it is stated indicate that when Congress contemplates the imposition of obligations with respect to the equipment of carriers it covers the subject by careful specific rules. Defendant argues that if it had been the intention of Congress to endow the commission with the power to require the purchase of equipment of specialized character Congress would have defined the manner in which and the extent to which this power might be exercised. Attention is also called to the commission's recommendation, in its last report to Congress, that carriers be required to furnish steel coaches for passenger traffic, and it is argued that this is an admission of its lack of jurisdiction over matters concerning a carrier's equipment. If the commission can require carriers to furnish tank cars for the movement of oil, defendant contends, it certainly must have jurisdiction to require them to furnish steel passenger coaches.

The attempted analogy does not exist. The power to require proper and adequate cars for the transportation of passengers, or of oil in bulk, is one thing. The power to require that such cars be of peculiar or especial design, pattern, or material is quite another thing. At common law shippers had a present remedy in the courts by suit for damages in case of a carrier's failure to perform its duty to transport safely. One of the conditions, however, which led to the passage of the act to regulate commerce and of the amendments thereto was the inability of shippers to find a present remedy in the case of rates charged for transportation of goods or regulations or practices affecting such transportation which were unjust, unreasonable, or discriminatory. And, as clearly appears from a reading of the provisions which were added by the amendment of 1906, to which reference has been made above, Congress at that time had in mind giving shippers a more adequate remedy in case the facilities for transportation were inadequate.

It is further contended by defendant that even if the act to regulate commerce declares the duty of carriers to provide special equipment it does not invest this commission with power to require the purchase of additional cars. It is stated that while the commission is charged with the enforcement of the act to regulate commerce its powers in cases coming up for decision after hearing on complaints,

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as provided in section 13, are fully defined in sections 15 and 16, which authorize the commission—

“ * * * to determine and prescribe * * * the just and reasonable * * * rate or rates * * * to be thereafter observed * * * and what * * * regulation or practice is just, fair, and reasonable to be thereafter followed, and to make an order that the carrier or carriers shall * * * conform to and observe the regulation or practice so prescribed.”

39 Defendant contends that the present case involves no rate, regulation, or practice, arguing that if it be a practice within the meaning of the act for the carrier to furnish only 500 tank cars it could be contended with equal reason that every detail of railroad operation is a practice within the meaning of the act. Practice, it is contended, connotes a continued method of operation and not merely a single act.

While the act does not specify that this commission should regulate every detail of railroad operation, we are required by its terms to determine whether any rate or any regulation or practice affecting transportation is just, reasonable, and nondiscriminatory. Among other things we are required to decide whether or not in specific cases carriers have complied with the requirements of the act to furnish adequate facilities upon reasonable request. In *Rail & River Coal Co. v. B. & O. R. R. Co.*, 14 I. C. C., 86, the commission said:

“ * * * the words ‘any regulations or practices whatsoever * * * affecting such rates’ are used synonymously with the words ‘regulation or practice in respect to such transportation;’ and * * * both clauses are to be read in the widest possible sense and embrace all regulations and practices of carriers under which they offer their services to the shipping public and conduct their transportation * * *.”

In *Mobile Chamber of Commerce v. M. & O. R. R. Co.*, 23 I. C. C., 417, after calling attention to the provisions of section 1, including the requirement that carriers shall furnish cars upon reasonable request therefor, the commission said:

“ * * * Under section 15 as amended in 1910 the commission is empowered to determine and prescribe what will be the just, fair, and reasonable regulation or practice which shall be thereafter followed by the carrier as to the services which the carrier is required to give under section 1.”

In *Arlington Heights Fruit Exchange v. S. P. Co.*, 20 I. C. C., 106, after calling attention to the relative advantages of precooling and standard refrigeration in the movement of citrus fruits from California to eastern markets, the commission said:

“Oranges can not be moved in box cars without ventilation. Let us assume that the ventilated car had been unknown and that the entire citrus-fruit crop had moved at all seasons of the year under refrigeration. It is discovered that by the use of a car so constructed that a current of air can be forced through the oranges by the motion of the car, two-thirds of the citrus-fruit crop can be transported

without the expense of refrigeration. Could the defendants under these circumstances insist that all oranges should continue to move under refrigeration and would they rest under no obligation to provide ventilated cars?

* * * * This vast tonnage should be handled in the most economical and satisfactory manner, and these carriers should furnish for that movement such cars as will effectuate that purpose. They have a right to insist upon a proper compensation for supplying that equipment, but they have no right to say that old methods must continue in use and new methods held in abeyance rather than change the form of their cars.

40 "The carrier may insist upon furnishing all the equipment which is needed for the movement of precooled shipments and might decline to use equipment furnished by the shippers, but it can not refuse to furnish proper equipment upon fair terms: * * *"

The carriers who were defendants in this case petitioned the Commerce Court to annul and set aside the commission's order. The Commerce Court approved the findings of the commission and dismissed the complaint, whereupon the case was appealed to the United States Supreme Court, which held, *Atchison Ry. Co. v. U. S.*, 232 U. S., 199:

"Whatever transportation service or facility the law requires the carrier to supply they have the right to furnish. They can therefore use their own cars, and can not be compelled to accept those tendered by the shipper on condition that a lower freight rate be charged. So, too, they can furnish all the ice needed in refrigeration, for this is not only a duty and a right, under the Hepburn Act, but an economic necessity due to the fact that the carriers can not be expected to prepare to meet the demand, and then let the use of their plants depend upon haphazard calls, under which refrigeration can be demanded by all shippers at one time and by only a few at another."

And at page 217:

"Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay. The interest of the public is to be considered as well as that of shippers and carriers * * *"

In *C. R. I. & P. Ry. Co. v. Hardwick Elevator Co.*, 226 U. S., 426, after referring to the provisions of section 1 of the act requiring carriers to furnish cars upon reasonable request, the United States Supreme Court said:

"Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty. * * *"

Attention should also be called to the following language used by the Commerce Court in *United States v. L. & N. R. R. Co.*, 195 Fed., 88:

"This court has no jurisdiction to consider the question of car distribution in advance of some action by the Interstate Commerce

Commission or to determine how many cars the Southern Railway shall furnish or how many the Louisville & Nashville Railroad shall furnish for the transportation of the petitioners' coal. It is believed, however, that this court has the undoubted jurisdiction upon the facts presented by the record to issue a writ or writs of mandamus directed to these common carriers, commanding them that, so long as they establish and maintain through routes and joint rates to southeastern territory, they shall move and transport in interstate commerce the coals of the petitioners when tendered in such reasonable quantities as may be determined either by agreement with the carriers or by the Interstate Commerce Commission if they can not agree."

The United States Supreme Court has repeatedly stated that the whole scope of the act to regulate commerce shows it to have been intended that this commission and not the courts shall pass upon administrative questions. *T. & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S., 426; *B. & O. R. R. Co. v. Pitcairn Coal Co.*, 215 U. S., 481; *Robinson v. B. & O. R. R. Co.*, 222 U. S., 506; *United States v. Pacific & Arctic Co.*, 228 U. S., 87; *P. R. R. Co. v. International Coal Mining Co.*, 230 U. S., 184; *Mitchell Coal & Coke Co. v. P. R. R. Co.*, 230 U. S., 247; *Morrisdale Coal Co. v. P. R. R. Co.*, 230 U. S., 304; *S. Ry. Co. v. Reid*, 222 U. S., 424; all of which are quoted from at length in *Vulcan Coal & Mining Co. v. I. C. R. R. Co.*, *supra*.

In *T. & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S., 426, 440, 441, it is stated that if, under the act to regulate commerce, the courts were given jurisdiction to determine the reasonableness of rates the result would be as follows:

"* * * if, without previous action by the commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the commission, would lead to favoritism, to the inforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted."

Can it be doubted that if the courts were required to state what demands for cars are reasonable and when a carrier's equipment is

adequate a similar lack of uniformity and like confusion would result?

In *Vulcan Coal & Mining Co. v. I. C. R. R. Co.*, supra, we said:

"Furthermore, one can not escape the conclusion that the question as to the extent to which defendant failed to comply with the duty it owed complainants to furnish cars upon reasonable request therefor is an administrative one of which the commission alone can take original jurisdiction. This must be true unless it be the carrier's absolute duty to furnish cars at all times to the full extent of the shipper's demands. Only then would this complaint present a question like that considered in *P. R. R. Co. v. International Coal Co.*, supra. It may be that after the determination by the commission of the number of cars which the defendant should have furnished and of the times when it should have furnished them the courts would have concurrent jurisdiction with the commission of the ascertainment of the damages suffered by complainants by reason of defendant's failure to perform that duty. However, it is not a carrier's duty to furnish all cars demanded at all times. In substance section 1 provides that upon reasonable request it shall be the duty of every carrier to furnish cars. By virtue of these requirements it becomes the carrier's duty to maintain a reasonably adequate car supply, and the question of what is a reasonably adequate car supply is just as much an administrative one as the question of what is a reasonable rate. The legal sufficiency of defendant's car supply can not be definitely fixed by the statute. It is a question which, using the language of the court in the *Mitchell* case 'involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of' this tribunal."

42 One further argument advanced by defendant should be considered in connection with the question of jurisdiction. Defendant states that to require the carrier to purchase additional equipment may involve a demand that the carrier increase its capital account, and the power of the commission can only properly be determined by a consideration of its right to require such action on the part of the railroads. But such an objection is not sound, because the question of the financial ability of any carrier would be a matter for consideration in judging of the reasonableness of the request for special or additional equipment and would be one of the matters considered by the commission in judging the particular case when the same arises.

The jurisdictional question disposed of, we will now turn our attention to the defendant's contention that even if the act to regulate commerce should be held to invest this commission with power to require carriers to purchase additional cars, the evidence in this proceeding does not justify the commission in exercising this power.

It is contended that the circumstances attending the transportation of commodities in tank cars are so peculiar as to constitute this a class of equipment which should be furnished by the shippers

themselves. Private ownership of tank cars prevails, particularly east of the Mississippi River. While it is recognized that the volume of shipments of petroleum is greater than the volume of shipments of any other liquid commodity, it is pointed out that there are numerous other liquid commodities transported in tank cars. Forty-four are enumerated in an exhibit. Some of the tank cars used for the transportation of these commodities are of very special construction. *Albree v. B. & M. R. R.*, 22 I. C. C., 303. The same car can not be used for different liquid products without thorough cleaning, and as a consequence each car must be practically confined to the use of one commodity. While the shipper of a single commodity can familiarize himself and his employees with the risks peculiar to the handling of that particular commodity, the carrier would be under the necessity of acquainting its employees with all the possible difficulties and dangers of all liquid commodities transported. Even the tank cars now devoted to the petroleum trade must be divided into classes and their use restricted to the refined, light lubricating, and heavy lubricating classes. The demand for tank cars amounts in substance to a demand not only for the vehicle but also for the package, and relieves the shippers of the expense of packing which they may properly be called on to bear.

Finally, attention is called to the fact that the Pennsylvania Railroad owns more tank cars than are owned by all the other carriers operating east of the Mississippi. Defendant states that if
43 the other railroads would furnish cars in the same proportion the supply would be sufficient to meet all requirements, but that complainants' demand would practically require the Pennsylvania Railroad to furnish equipment available for use by all the railroads in this territory.

While it must be recognized that for the shipment of some of the products which now move to a certain extent in tank cars it would not be reasonable to require carriers to furnish tank cars, we do not believe this to be the case in the movement of the products of petroleum. In many industries a few tank cars will suffice to move the products of the industry. In other cases the tank cars must be prepared for shipment in a manner which is peculiarly within the technical knowledge of the men connected with that industry, or the handling of the commodity is a dangerous operation which can be safely performed only by men engaged in its production. In the latter case a shipper's request for cars peculiarly suited for the transportation of his products would not be a reasonable one, and in such cases carriers should publish rates for the transportation of the privately owned tank car filled with these products and not, as in the case of oil, for the transportation of the product in tank cars. The railroad would not then hold itself out to transport the commodity in any other way than in tank cars offered by the shipper, and no obligation would rest upon it to furnish these cars. In such cases the shipper should receive no rental for the use of the car.

The record does not show such technical knowledge to be needed in the shipment of petroleum products in tank cars as to render unreasonable complainants' request to furnish cars. The fact that the defendant has for more than 20 years past been furnishing tank cars for the shipment of oil bears witness to the contrary. We see no particular hardship to defendant arising out of the necessity of allowing its equipment to move beyond its lines. Further, the necessity of defendant's purchasing a large number of additional tank cars does not follow from our holding in the present case. The requirement of the act is that defendant provide and furnish—not necessarily buy—a reasonably adequate supply of cars, and the 13,000 and more tank cars owned by independent car lines are available to defendant as well as to shippers. Defendant's brief contains the suggestion that perhaps the solution will be to have private companies furnish cars of special types. That is a solution of which the carriers can avail themselves if they so desire. Moreover, all cars used by carriers, whether they be owned by the carriers themselves or leased from private car lines or from shippers, must be distributed without discrimination. Hereafter the cars leased carriers by shippers or private car lines will be regarded as cars controlled by the carriers, which must be distributed without discrimination

44 just as in the case of cars owned by the carriers. This includes all cars secured from shippers for the use of which carriers pay compensation. Carriers should lease cars only upon such terms as permit them to meet their obligation to furnish cars without discrimination. Under this ruling cars of complainants and of all other refiners upon defendant's line offered it for use at a compensation will become available to defendant for distribution among all shippers who may apply for them. At the same time defendant will be under no obligation to accept for use any privately owned cars unless it chooses to do so. *Atchison Ry. Co. v. U. S.*, supra.

The responsibility to the shipper of furnishing a proper supply of cars rests upon the road upon which the shipper is located and the traffic originates. *Campbell's Creek Coal Co. v. A. A. R. R. Co.*, 33 I. C. C., 558, 562; *Coal Rates on the Stony Fork Branch*, 26 I. C. C., 168, 174. The originating line as between it and its connections does not necessarily rest under the burden of supplying all the cars which may be required for transportation over through routes and under joint rates, but in the case of through routes composed of two or more carriers the obligation to furnish cars for transportation over such through routes is joint upon the carriers therein. *Huerfano Coal Co. v. C. & S. E. R. R.*, 28 I. C. C., 502, 506; *Lumber Rates through Ohio River Crossings*, 29 I. C. C., 38, 39; *Pittsburgh & S. W. Coal Co. v. W. P. T. Ry. Co.*, 31 I. C. C., 660, 663.

One of the tests which may be relied upon in determining the reasonableness of a shipper's request for cars is to be found in the volume of his shipments in the past, due allowance being made for the growth of his business. Complainants have not only shown that

the volume of their past shipments is such as to justify the demands for equipment which they have made but also have introduced evidence tending to show that in the future the volume of their business will be as great as in the past. Defendant will be required, upon reasonable request and reasonable notice, to furnish tank cars in sufficient number to move complainants' normal production. Defendant can not be required to furnish all the cars which may be demanded by complainants under extraordinary conditions arising from exceptional causes, which could not reasonably have been anticipated and which make it physically impossible to furnish all the cars desired.

An appropriate order will be entered.

CLARK, *Commissioner*, dissenting:

I am unable to agree with the conclusions reached by the majority. I do not think that the enactment of the provision of section 1 of the act, "and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation
45 upon reasonable request therefor," enlarged the obligations or duties laid upon the carriers in this respect by the common law. It seems to me to have been the incorporation in the act of a declaration of the common-law duty of the carriers as a foundation for the exercise of the powers conferred upon the commission by the act. The terms "railroad" and "transportation" are defined in section 1 in terms which are and were intended to be inclusive of all of the carrier's transportation facilities that are subject to regulation under the act. Section 15 enumerates various powers that are conferred upon the commission, and provides that that enumeration shall not exclude any power which the commission would otherwise have under the provisions of the act. Section 20 specifies certain liabilities which shall rest upon the carrier in the event of loss of or damage to property received by it for transportation, and provides that nothing in the section shall deprive the holder of the carrier's receipt or bill of lading of any remedy or right of action which he has under existing law. There is no language in section 1 which indicates a legislative intent to expand the common-law duty of carriers to furnish facilities for transportation.

The majority report in the instant case reasserts the possession by the commission of powers that were asserted in the majority report in *Vulcan Coal & Mining Co. v. I. C. R. R. Co.*, 33 I. C. C., 52. If the act confers upon the commission power to order a carrier to enlarge its complement of cars and to award damages against it if it fails to comply with such order, it seems logically and necessarily to follow that the commission has the same power to order enlargement of terminal facilities, increase in the number of locomotives, and extension of tracks or branches. In fact, no facility of transportation is exempt. I think that this power is vested in the courts and not in the commission. For the reasons that were more fully stated

in the dissent in the Vulcan Coal & Mining Co. case, *supra*, I am not able to accept the views of the majority on this point.

There can be no question of the right and power of the commission to so regulate the use of the facilities possessed by the carrier that there shall be no unjust discrimination. Plainly the shipper should not be required to deal with any other than the carrier in contracting for and receiving transportation, and such was plainly the intent of the Congress when all of the facilities were made subject to the act, regardless of ownership thereof. I, of course, agree that the carrier may provide facilities by purchase, lease, or rental, and that by whatever means they are acquired by the carrier the shipper has a right to demand the use thereof and service therefrom without unjust discrimination against or undue preference in favor of any.

Commissioner Clements requests me to say that he concurs in this dissent.

46 HARLAN, *Commissioner*, also dissenting:

I concur in the general thought underlying the dissenting report herein of my brother Clark, namely, that the language in the act upon which the majority report is largely based is simply declaratory of the general duty of carriers at common law to furnish such cars and other facilities as are reasonably necessary to enable them to fulfill their public obligations, but does not impose upon this commission any such administrative duty or any such jurisdiction and power as are asserted in the majority report and in the order accompanying it.

47 Order. At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of May, A. D. 1915.

PENNSYLVANIA PARAFFINE WORKS	}	No. 5574.
<i>v.</i>		
THE PENNSYLVANIA RAILROAD COMPANY.		

CREW-LEVICK COMPANY	}	No. 5574 (Sub-No. 1).
<i>v.</i>		
SAME.		

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist, on or before August 15, 1915, and thereafter to abstain, from refusing upon reasonable request and reasonable notice therefor to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report

to be in violation of the provisions of the act to regulate commerce and amendments thereto.

It is further ordered, That said defendant be, and it is hereby, notified and required to provide, on or before August 15, 1915, and thereafter to furnish, upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

And it is further ordered, That this order shall continue in force for a period of not less than two years from the date when it shall take effect.

By the commission.

[SEAL.]

GEORGE B. MCGINTY,
Secretary.

48 In the District Court of the United States for the Western
District of Pennsylvania. November Term, 1915.

THE PENNSYLVANIA RAILROAD COMPANY,	} No. 39.
<i>vs.</i>	
UNITED STATES OF AMERICA.	

Filed July 9th, 1915. J. Wood Clark, clerk.

Service of notice.

And now—to wit, this 9th day of July, 1915—comes C. F. C. Arensberg, who, being duly sworn, deposes and says that on July 6, 1915, he sent by registered mail a true and correct copy of the petition filed by the plaintiff in the above proceeding to T. W. Gregory, Attorney General of the United States, at the Department of Justice, Washington, D. C., the registry return receipt showing the receipt thereof by the Attorney General, being attached hereto.

CHARLES F. C. ARENSBERG.

Sworn to and subscribed before me the day and year aforesaid.

[SEAL.]

EMMA M. HALLER,
Notary Public.

My commission expires March 9, 1919.

49 In the District Court of the United States for the Western
District of Pennsylvania. November Term, 1915.

THE PENNSYLVANIA RAILROAD COMPANY,	} No. 39.
<i>vs.</i>	
UNITED STATES OF AMERICA.	

Filed July 13th, 1915. J. Wood Clark, clerk.

Service of notice.

And now—to wit, this 13th day of July, A. D. 1915—comes C. F. C. Arensberg, who, being duly sworn, deposes and says that on July 6,

1915, he sent by registered mail a true and correct copy of the petition filed by the plaintiff in the above proceeding to George B. McGinty, secretary of the Interstate Commerce Commission, at Washington, D. C., the registry return receipt showing the receipt thereof by the secretary, being attached hereto.

C. F. C. ARENSBERG.

SWORN to and subscribed before me the day and year aforesaid.
[SEAL.]

EMMA M. HALLER,
Notary Public.

My commission expires March 9, 1919.

50 In the District Court of the United States for the Western District of Pennsylvania. November Term, 1915.

THE PENNSYLVANIA RAILROAD COMPANY,
complainant,

v.

UNITED STATES OF AMERICA, DEFENDANT.

In Equity, No. 39.

Filed Aug. 2d, 1915. J. Wood Clark, clerk.

Motion of the United States to dismiss the petition.

Comes now the United States, defendant, by its counsel, and moves the court to dismiss the petition in the above-entitled cause at the cost of the petitioner.

As grounds for this motion it is shown—

1. The petition, including the exhibits attached thereto and made a part thereof, is without equity on its face and does not state any cause of action against the defendant, and the court may not grant the relief prayed or any part of the same.

2. It appears from the petition and the exhibits attached thereto and made a part thereof that the order of the Interstate Commerce Commission sought to be enjoined, set aside, annulled, or suspended was authorized by the act to regulate commerce, and that it was regularly made and entered by the commission in a proceeding properly pending and conducted.

51 3. The report of the Interstate Commerce Commission and the order entered in pursuance thereof were made and entered after a full hearing and due notice and rest on substantial evidence adduced on the issues made by the parties and the matters and things alleged in the petition and sought to be put in issue are foreclosed by the findings of fact.

4. The complainant has not in and by its said petition shown that in making its said orders the Interstate Commerce Commission transcended the powers conferred upon it by the statute or violated any right of the petitioner protected by the Constitution of the United States or any other right of the petitioner over which this court may exercise jurisdiction.

Wherefore, and for divers other good causes appearing on the face of the said petition more fully to be pointed out on the hearing hereof, this defendant prays that its motion be sustained and for such other and further action as may be appropriate in the premises.

E. LOWRY HUMES,

United States Attorney,

Western District of Pennsylvania.

BLACKBURN ESTERLINE,

Special Assistant to the Attorney General.

We hereby accept service of notice of the filing of motion of the United States to dismiss the petition in the above-entitled case, of which the foregoing is a copy.

_____,
Attorneys for Complainant.

PITTSBURGH, PA., August 2, 1915.

52 Service accepted of the within motion this 3rd August, 1915.

PATTERSON, CRAWFORD & MILLER,

Solicitors for P. R. R.

53 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT, }

v.

THE UNITED STATES OF AMERICA, DEFENDANT. }

In Equity,
No. 39.

Filed Sept. 16, 1915. J. Wood Clark, clerk.

Appearance of the Interstate Commerce Commission.

We hereby enter the appearance of the Interstate Commerce Commission and of ourselves as counsel in the above-entitled cause.

JOSEPH W. FOLK,

EDWARD W. HINES.

Counsel for the Interstate Commerce Commission.

54 In the District Court of the United States for the Western District of Pennsylvania. November Term, 1915.

THE PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT, }

v.

THE UNITED STATES OF AMERICA, DEFENDANT. }

In Equity,
No. 39.

Filed Sept. 16, 1915. J. Wood Clark, clerk.

Petition of the Crew-Levick Company, successor to the Pennsylvania Paraffine Works, intervenor.

The petition of the Crew-Levick Company, a corporation formed and existing under and by virtue of the laws of the Commonwealth

of Pennsylvania, having its principal office and place of business in the city of Philadelphia, Pennsylvania, being engaged in the business of refining, manufacturing, dealing, and shipping petroleum and its products, and having purchased, acquired, and succeeded to all the property, rights, and privileges of the Pennsylvania Paraffine Works, at Titusville, Pennsylvania, and as such successor being the real party at interest in the above cause, humbly complaining of the Pennsylvania Railroad Company, plaintiff in the above cause, would show unto your Honors that said The Pennsylvania Railroad Company, plaintiff, did on the day of June, A. D. 1915, file its bill of complaint in this cause wherein it is alleged.

1. That the Pennsylvania Paraffine Works, to which petitioner is the legal successor, on the 26th day of February, 1913, filed a certain petition before the Interstate Commerce Commission against complainant herein, a copy of which is attached to complainant's bill and marked "Exhibit A."

55 2. That by the said petition the Pennsylvania Paraffine Works, to which your petitioner is successor, sought to obtain an order from said Interstate Commerce Commission requiring complainant herein, the Pennsylvania Railroad Company, to furnish to said The Pennsylvania Paraffine Works tank cars for the transportation of oil in interstate commerce from its refinery at Titusville, Pennsylvania.

3. That complainant herein, the Pennsylvania Railroad Company, filed its answer to said petition before the Interstate Commerce Commission denying any obligation on its part under the provisions of the act to regulate commerce or under the law generally to furnish vehicles of any specified description, and, in particular, tank cars, for the transportation in interstate commerce of oil for said The Pennsylvania Paraffine Works from Titusville, Pennsylvania, but averring full performance on its part of all its lawful duties in connection with the furnishing of transportation facilities to said The Pennsylvania Paraffine Works, as set out in full in "Exhibit B" attached to its bill of complaint herein.

4. That thereafter, to wit, on the 19th day of November, 1914, the Interstate Commerce Commission at Buffalo, New York, made due inquiry and investigation of the matters and things alleged in said petition and answer conjointly with a like petition and answer in a proceeding before the Interstate Commerce Commission brought by petitioner, the Crew-Levick Company, against the Pennsylvania Railroad Company and made a record of the testimony, and thereafter and in connection therewith considered the briefs and arguments submitted by all parties to the proceedings, and thereafter, to wit, on the 11th day of May, 1915, made a report of their findings and conclusions and entered an order in favor of said The Pennsylvania Paraffine Works and the Crew-Levick Company, as set forth in "Exhibit D" attached to complainant's bill herein.

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5. That complainant herein, the Pennsylvania Railroad Company, alleges in its bill of complaint: (a) That the order of the Interstate Commerce Commission entered in the aforesaid proceedings and shown in said "Exhibit D" is without lawful warrant; (b) that the Interstate Commerce Commission is without authority to make the order aforesaid; (c) that there is nothing in the act to regulate commerce or other law authorizing the Interstate Commerce Commission to make the aforesaid order in the character of proceedings aforesaid; (d) that the order aforesaid is in violation of the fifth amendment of the Constitution of the United States; (e) that obedience to said order would subject the Pennsylvania Railroad Company, complainant herein, to a multiplicity of suits and to actions for damages; (f) that the time allowed by said order is not sufficient to comply therewith; (g) that the aforesaid order is uncertain and indefinite and without warrant of law; (h) that unless said order is enjoined and set aside complainant herein, the Pennsylvania Railroad Company, will be subject to heavy penalties; and (i) that complainant herein, the Pennsylvania Railroad Company, is remediless under the strict rule of common law and is only relievable in a court of equity and prays that a preliminary or interlocutory order or injunction be entered restraining and suspending the said order of the Interstate Commerce Commission until the final determination of this cause and that at the final hearing a decree be entered enjoining, setting aside, annulling, and suspending the said order of the Interstate Commerce Commission and enjoining the enforcement thereof.

That your petitioner claims an interest in this cause in that said The Pennsylvania Paraffine Works, to which your petitioner is successor, was a party complainant before the Interstate Commerce Commission and filed its petition as set out in "Exhibit

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A" in complainant's bill of complaint herein, participated as complainant in all of the proceedings aforesaid before the Interstate Commerce Commission, and that the order entered by the Interstate Commerce Commission was in behalf and for the relief of said The Pennsylvania Paraffine Works, and that said order is a lawful and valid order made in accordance with the provisions of the act to regulate commerce and with full authority, and that the same is just and reasonable.

That if said order is enjoined, set aside, annulled, and suspended, as prayed for by complainant herein, the Pennsylvania Railroad Company, your petitioner will suffer great loss and damage in its said business.

That petitioner, by reason of its interest aforesaid, has a right to participate in the proceedings and in any decree that may be made and entered in this cause.

Wherefore, petitioner prays that it may be permitted to file its petition of intervention and be made a party defendant with the right to answer the said bill of complaint, or to file such other plead-

ings as its interest in this cause may seem to require, and to participate in all the proceedings herein as a defendant to this action.

And your petitioner will ever pray.

GEORGE E. SPRING, (Signed.)

C. D. CHAMBERLIN, (Signed.)

Solicitors and Counsel for the Crew-Levick Company.

58 COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

Before me, the subscriber, a notary public in and for the county of Philadelphia, residing in the city of Philadelphia, personally appeared the undersigned, William Muir, who, being duly sworn by me according to law, deposes and says that he is the president of the Crew-Levick Company, intervener; that he has read the foregoing petition, and that the same is true, except such matters as are therein stated upon information and belief, and as to them he believes them to be true.

WM. MUIR. (Signed.)

Sworn to and subscribed to before me this 15th day of September, A. D. 1915.

[SEAL.]

LOUIS DU HADWAY, (Signed.)

Notary Public.

My commission expires January 16, 1917.

59 In the District Court of the United States for the Western District of Pennsylvania. November Term, 1915.

THE PENNSYLVANIA RAILROAD COMPANY, COM-
plainant,

v.

THE UNITED STATES OF AMERICA AND THE
Crew-Levick Company, intervener, defend-
ants.

In Equity. No. 39.

Filed Sept. 16, 1915. J. Wood Clark, clerk.

Order.

This cause coming on to be heard on the application of the Crew-Levick Company, successor to the Pennsylvania Paraffine Works, intervener in this suit, to be made a party defendant, and the petition having been duly considered, and it appearing to the court that said The Pennsylvania Paraffine Works, to which the Crew-Levick Company is successor, was complainant in a certain proceeding before the Interstate Commerce Commission, wherein an order was made requiring the Pennsylvania Railroad Company, defendant in said action and complainant herein, to furnish tank cars to said The Pennsylvania Paraffine Works for the transportation of oil from Titusville, Pennsylvania, in interstate commerce, and that said The Crew-Levick Company has a material interest in this cause, it is

therefore ordered, adjudged, and decreed that said The Crew-Levick Company, petitioner, has leave to intervene in said suit and to that end may appear in said suit within 10 days from the date of this order in the same manner and with like effect as if named in the original bill as a party defendant.

This order to be without prejudice to any proceedings heretofore had in this cause.

VICTOR B. WOOLLY, (Signed.)
Judge.

60 In the District Court of the United States for the Western District of Pennsylvania. November Term, 1915.

THE PENNSYLVANIA RAILROAD COMPANY, COM- plainant, v. THE UNITED STATES OF AMERICA, DEFENDANT.	}	In Equity. No. 39.
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Filed Sept. 16, 1915. J. Wood Clark, clerk.

Answer of the Crew-Levick Company, successor to the Pennsylvania Paraffine Works, intervener.

To the honorable the judges of the said court:

The Crew-Levick Company, a corporation formed and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, having purchased, acquired, and succeeded to all the property, right, and privileges of the Pennsylvania Paraffine Works, at Titusville, Pennsylvania, and being the real party at interest, leave having first been asked and obtained to intervene and to be made a party defendant by order of court, reserving all manner of exceptions that may be had to the uncertainties and imperfections of the bill of complaint, comes and answers thereto, or to so much thereof as it is advised is material to be answered, and says:

1. To the first allegation of the bill, admits that complainant is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, as alleged, and that it is a common carrier by railroad possessed of all the corporate rights, privileges, and franchises conferred by said act of April 13th,
61 1846, entitled "An act to incorporate the Pennsylvania Railroad Company," and acts amendatory thereof and supplementary thereto, and alleges that it is also impressed with all the duties, liabilities, and obligations imposed by the general law upon common carries by railroad and is subject to all the provisions of the act to regulate commerce, effective February 4th, A. D. 1887, and all acts of Congress amendatory thereof and supplementary thereto.

Admits that complainant's principal operating office is located in the city of Philadelphia, in the State of Pennsylvania.

2. Admits that said The Pennsylvania Paraffine Works at the time of filing said bill of complaint was a business corporation organized and existing under and by virtue of the laws of the

Commonwealth of Pennsylvania, engaged in the business of refining petroleum, and having its residence and principal office in the city of Titusville, in the State of Pennsylvania, but alleges that since the filing of complainant's bill in this case intervener, the Crew-Levick Company, has purchased, acquired, and succeeded to all the property, rights, and privileges of said the Pennsylvania Paraffine Works, at Titusville, Pennsylvania.

3. Admits the third allegation as stated by complainant in its bill of complaint.

4. Admits that by its petition, as set out at length as "Exhibit A" in complainant's bill, said The Pennsylvania Paraffine Works sought to obtain an order from the Interstate Commerce Commission requiring the Pennsylvania Railroad Company to furnish tank cars to it, the said The Pennsylvania Paraffine Works, for the transportation of oil in interstate commerce from said The Pennsylvania Paraffine Works' refinery at Titusville, Pennsylvania.

62 5. Admits the fifth allegation as stated in complainant's bill, and refers to said "Exhibit B" attached thereto as showing complainant's admissions and denials.

6. Intervener, the Crew-Levick Company, successor to said The Pennsylvania Paraffine Works, is without information as to the matters contained in the sixth allegation of complainant's bill, and alleges that, if the Pennsylvania Railroad Company filed a motion to dismiss the petition of said The Pennsylvania Paraffine Works before the Interstate Commerce Commission, as stated in "Exhibit C" attached to the bill of complaint, notice of such motion was not served upon said The Pennsylvania Paraffine Works, nor was any hearing had thereon before the Interstate Commerce Commission in which the said The Pennsylvania Paraffine Works participated.

7. Admits the allegations contained in the seventh paragraph of complainant's bill.

8. Admits the allegations contained in the eighth paragraph of complainant's bill.

9. Admits the allegations contained in the ninth paragraph of complainant's bill, and alleges that since the filing of said bill the Interstate Commerce Commission by a supplemental order has postponed the effective date of the order set out in said paragraph until November 15th, A. D. 1915, in words as follows:

"At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 14th day of July, A. D. 1915. No. 5574. Pennsylvania Paraffine Works v. The Pennsylvania Railroad Company. No. 4574 (Sub. No. 1). The Crew-Levick Company v. Same.

63 "Order modifying former order.

"Upon further consideration of the record in the above-entitled cases, and good reason appearing therefor:

"It is ordered that the order entered herein on May 11, 1915, and by its terms made effective August 15, 1915, be, and it is hereby,

modified so that it will become effective on November 15, 1915, instead of on said August 15; but in all other respects the said order of May 11, 1915, shall remain in full force and effect.

"By the commission:

"[SEAL.]

"GEORGE B. MCGINTY,

"*Secretary.*"

10. Intervener, the Crew-Levick Company, has no information of what its counsel has advised complainant, the Pennsylvania Railroad Company, concerning its legal obligations to supply tank cars for the transportation of petroleum under provisions of the act to regulate commerce or other laws or of the lawful warrant of the Interstate Commerce Commission to make the said order of May 11th, 1915, and alleges that under the provisions of the act to regulate commerce, the common law of carriers, its own published tariffs, and its long-continued professions and performances complainant is obligated to furnish intervener, the Crew-Levick Company, successor to said The Pennsylvania Paraffine Works, with tank cars for the transportation of petroleum in interstate commerce, and that the said order of May 11th, 1915, of the Interstate Commerce Commission is a lawful and valid order in every respect.

11. Denies that the act to regulate commerce, approved February 4th, A. D. 1887, and acts of Congress amendatory thereof and supplementary thereto, do not authorize the Interstate Commerce Commission to make said order of May 11th, 1915, set out in "Exhibit D" in complainant's bill.

12. Denies that the act to regulate commerce, approved February 4th, A. D. 1887, and acts of Congress amendatory thereof and supplementary thereto, do not authorize the Interstate Commerce Commission in a proceeding of the character referred to in complainant's bill as depending before it between said The Pennsylvania Paraffine Works and the Pennsylvania Railroad Company to make said order of May 11th, 1915, set out in "Exhibit D" in complainant's bill and avers that the character of said proceedings and the order made therewith were in accordance with law in every respect.

13. Denies that the order of May 11, 1915, aforesaid, of the Interstate Commerce Commission assumes to require complainant herein, the Pennsylvania Railroad Company, to furnish tank cars to intervener, the Crew-Levick Company, successor to the Pennsylvania Paraffine Works, for through transportation of shipments of petroleum in interstate commerce when such tank cars happen to be on the railroad of complainant, whether or not such cars are owned by complainant or by other railroad companies or by private individuals.

Denies that the Interstate Commerce Commission's order of May 11th, 1915, aforesaid, is without lawful warrant or contrary to the provisions of the act to regulate commerce or that obedience thereto would subject complainant to actions for damages on the

part of owners of such cars and to liability in such actions or that the said order is unlawful and contrary to the provisions of the fifth amendment of the Constitution of the United States.

15. Denies that the order of the Interstate Commerce Commission, aforesaid, deprives complainant, the Pennsylvania Railroad Company, of its property without due process of law in that the time allowed is not sufficient to enable complainant to build tank cars for the transportation of petroleum in interstate commerce for the Crew-Levick Company, successor to said The Pennsylvania

65 Paraffine Works, or to arrange to acquire such cars, or to obtain the use of them from present owners; and refers to the extension of the effective date of said order, above referred to, to November 15th, 1915; and denies that for any of the reasons aforesaid the said order of the Interstate Commerce Commission is without lawful warrant or in violation of the fifth amendment of the Constitution of the United States.

16. Denies that the order of the Interstate Commerce Commission, aforesaid, is uncertain and indefinite and without warrant in law.

17. Denies that the said order of the Interstate Commerce Commission, aforesaid, is unlawfully, or make and promulgated in assumed exercise of authority unlawfully claimed by said commission under the said act, or that it will, unless the same be enjoined, set aside, annulled, and suspended by the honorable court, subject complainant, the Pennsylvania Railroad Company, to a multiplicity of suits for the enforcement of the said order under the provisions of the act to regulate commerce, or will work irreparable damage to complainant herein.

18. Denies that if complainant should be required to comply with the aforesaid order of the Interstate Commerce Commission it will be subjected to any loss or damage, and avers that the bill of complaint, including the exhibits attached thereto and made a part thereof, shows upon its face that the order sought to be enjoined, set aside, annulled, and suspended was authorized by the act to regulate commerce, and that it was regularly made and entered after due notice and full hearing and upon substantial evidence, and is therefore without equity and does not state a cause of action.

Wherefore, intervener, the Crew-Levick Company, successor to said The Pennsylvania Paraffine Works, having made full answer to all matters and things contained in the bill of complaint, this defendant prays to be hence dismissed with its costs in its behalf incurred.

GEORGE E. SPRING. (Signed.)

C. D. CHAMBERLIN. (Signed.)

Solicitors for the Crew-Levick Company, Intervener.

COMMONWEALTH OF PENNSYLVANIA, County of Philadelphia, ss:

Personally appeared before me, a notary public in and for said county, William Muir, who, being first duly sworn, deposes and says that he is president of the Crew-Levick Company, intervener in

the above cause; that he has read the foregoing answer; and that the matters and things therein contained are true as he verily believes.

WM. MUIR. (Signed.)

Sworn to and subscribed to before me this 15th day of September,
A. D. 1915.

[SEAL.]

LOUIS DU HADWAY, (Signed.)
Notary Public.

My commission expires January 16, 1917.

67 In the District Court of the United States for the Western
District of Pennsylvania. Nov. Term, 1915.

PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT,
vs.

UNITED STATES OF AMERICA AND CREW-LEVICK } No. 38.
Company, a corporation of the Commonwealth
of Pennsylvania, defendants. }

PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT,
vs.

UNITED STATES OF AMERICA AND PENNSYLVANIA } No. 39.
Paraffine Works, a corporation of the Common-
wealth of Pennsylvania, defendants. }

Filed Nov. 9th, 1915. J. Wood Clark, clerk.

Petition for an interlocutory order or preliminary injunction restraining and suspending until the final determination of this cause an order of the Interstate Commerce Commission requiring the Pennsylvania Railroad Company to cease and desist from pursuing certain practices found to be in violation of the provisions of the act to regulate commerce. Motion to dismiss the petition.

Before Woolley, circuit judge, and Orr and Thomson, district judges.

The refined oil product of this country is carried and transported in tank cars, by pipe lines, and by rail in barrels or similar containers.

The cost of carrying oil in barrels is three and one-half cents a gallon above the cost of carrying it in tank cars, due to freight charges on the weight of the barrels and to the added cost of handling, maintenance, and replacement, making shipment by this method expensive, if not prohibitive.

Ninety-one per cent of the refined oil product is carried in tank cars, the remainder being carried by pipe lines and by rail in barrels. The oil carried in tank cars is consigned and shipped almost exclusively in privately owned tank cars—that is, tank cars owned by or leased to the shipper—for the use of which the carrier

68 pays wheelage. The number of tank cars in the United States

is 40,000. The number of privately owned tank cars east of the Mississippi River is 27,700. The Pennsylvania Railroad Company owns 499. Other carriers east of the Mississippi River own in the aggregate 303. Some carriers own none.

Fifty-two kinds of articles used for food and in the arts are shipped in tank cars. Differences in the nature and uses of the articles make impossible the interchange of tank cars for their shipment.

The Pennsylvania Railroad Company publishes rates for the transportation of oil in tank cars and furnishes tank cars within the limit of its supply.

The oil refineries of the Pennsylvania Paraffine Works and Crew-Levick Company are situate in the State of Pennsylvania and are served by the Pennsylvania Railroad Company and the New York Central Railroad Company. The Pennsylvania Paraffine Works ships monthly about 750,000 gallons of refined oil, of which ninety-one per cent moves in tank cars, one and one-half per cent in barrels and the remainder in pipe lines.

Crew-Levick Company ships monthly about 500,000 gallons of refined oil, of which eighty-six per cent moves in tank cars and about five per cent in barrels and the remainder in pipe lines. The former company owns 54 tank cars and the latter company fifty-seven.

It developed in the testimony that the tank cars furnished by the railroad company in addition to the complainants' privately owned tank cars were not at all times sufficient to meet the requirements of the complainants' business. During a specimen period it appears that of the monthly shipments of the product of the former company eighty-three carloads were carried in its privately owned tank cars and thirteen carloads in tank cars furnished by the railroad company, and of the monthly shipments of the product of the latter company 70 carloads were carried in its privately owned tank cars and 12 carloads in tank cars provided by the railroad company.

The tank cars owned by the two companies, together with their pro rata share in the distribution of the tank cars of the railroad company, being inadequate for their requirements and conceiving it to be the duty of the railroad company to furnish tank cars of the type and in the number required, the two companies demanded of the Pennsylvania Railroad Company a sufficient number of tank cars in which to ship their monthly product. To this demand the

69 railroad company replied, "We beg to say that the railroad company is not prepared to increase its present tank-car equipment but is prepared to transport the commodity, when properly contained in barrels or other similar containers, at rates that are fair, reasonable, and nondiscriminatory." Whereupon complaints were lodged with the Interstate Commerce Commission, a hearing held, and the following order made:

"It is ordered, That the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist, on or before August 15, 1915, and thereafter to abstain from refusing, upon rea-

sonable request and reasonable notice therefor, to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the act to regulate commerce and amendments thereto.

"It is further ordered, That said defendant be, and it is hereby, notified and required to provide, on or before August 15, 1915, and thereafter to furnish, upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

"And it is further ordered, That this order shall continue in force for a period of not less than two years from the date when it shall take effect."

After securing an extension of the order, the railroad company filed its petition in this court, praying that a preliminary injunction be entered restraining and suspending the order of the Interstate Commerce Commission. The Government moved to dismiss the petition. The motion and the petition were heard together.

WOOLLEY, *Circuit Judge* (after stating the facts as above) :

The proceeding now before the court was instituted and conducted under section 13 of the act to regulate commerce, giving to any person complaining of anything done or omitted to be done by a common carrier in contravention of the provisions of the act, the right to apply to the Interstate Commerce Commission for redress; and after a finding adverse to the carrier the order entered was made under section 15 of the act, which provides in effect that whenever,

70 after hearing, the commission shall be of opinion that a practice of a carrier is unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of the act, the commission is authorized and empowered to determine and prescribe what practice is just, fair, and reasonable, and to order the carrier to cease and desist from the unlawful practice, and thereafter to conform to and observe the regulation or practice prescribed, under penalty of five thousand dollars for each offense.

The practice of the railroad company found by the commission in this instance to be violative of the statute is not that the railroad company discriminated against the shipper by an unequal distribution of tank cars. It is conceded that the commission may require a carrier to desist from a discriminatory practice in car distribution. This is one of the admitted powers of the commission to be exerted over a carrier in the use of the instrumentalities which it possesses.

What the commission found was that the railroad company was guilty of an unjust and an unreasonable practice in not possessing or in not acquiring and furnishing tank cars in sufficient number to meet the requirements of the complainants' business.

The question in this case in the abstract is whether the act to regulate commerce, as amended, imposes upon a carrier the duty to acquire and to provide and furnish transportation of a type that, physically or economically, is best adapted to the needs and uses of the shipper, of which the Interstate Commerce Commission is the judge. The precise question is whether the Interstate Commerce Commission has power to compel the Pennsylvania Railroad Company to purchase and acquire tank cars for the shipment of oil, and to provide the same to complaining shippers upon requests which the commission may adjudge reasonable.

For the validity of its order the Interstate Commerce Commission relies upon several provisions of the act to regulate commerce as amended and upon certain changes and differences in the act created by its amendments. The first section of the act, both in its original and amended state, contains definitions of different branches of the subject with which the act deals. The terms "common carrier," "railroad," and "transportation" are, by express language, given their statutory meaning. Section 1 of the act of 1887 provides that

71 "the term 'transportation' shall include all instrumentalities of shipment or carriage." As amended by the act of 1906, the term "transportation" is enlarged and is made to "include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage and handling of property transported." Having stated of what transportation consists, the section prescribes it to "be the duty of every carrier * * * to provide and furnish such transportation upon reasonable request therefor."

Excerpts from several opinions of the Supreme Court were cited in support of the Government's contention that a railroad company, holding itself out as a carrier, is under a legal obligation, arising out of the fact of its employment, to provide transportation means and facilities commensurate with the demands of shippers, without regard to whether they possess them or have the money with which to acquire them. These excerpts were, of course, not cited as decisive of the question in issue, because upon examination it is disclosed that the cases from which they were taken were decisive of matters altogether different. These expressions of the Supreme Court, standing alone and considered without reference to the facts of the cases in which they appear, seem to support the Government's contention, but an examination of the cases discloses that the suitable and necessary means and facilities which the Supreme Court has said the carrier must provide have especial reference and relation to the facts of those cases, which in nearly every instance present questions of discrimination or of "services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling, or property transported," as specifically provided by the statute. In none of them was the

question raised or decided nor in any did the Supreme Court reveal its opinion as to whether there devolved upon a carrier a statutory duty to provide and furnish transportation of a type it did not possess, or to acquire such transportation in order to provide and furnish the same upon reasonable request. *Railroad Co. vs. Pratt*, 22 Wall., 123, 128; *Covington Stock Yards Co. vs. Keith*, 139 U. S., 128, 133; *Arlington Heights Fruit Exchange vs. Southern Pacific Co.*, 20 I. C. C., 106, affirmed by the Supreme Court in *Acheson Ry. Co. vs. United States*, 232 U. S., 199; *Chicago, Rock Island and Pacific Ry. Co. vs. Hardwick Farmers' Elevator Co.*, 226 U. S., 426; *Missouri, Kansas and Texas Ry. Co. vs. Harris*, 234 U. S., 412, 418; *Yazoo and Mississippi Valley R. R. Co. vs. Greenwood Grocery Co.*, 227 U. S., 1; *St. Louis, Iron Mountain and Southern Ry. Co. vs. Edwards*, 227 U. S., 265; *Hampton vs. St. Louis, Iron Mountain and Southern Ry. Co.*, 227 U. S., 456; *Penn Refining Co. vs. Western New York and Pennsylvania R. R. Co.*, 208 U. S., 208; *Texas and Pacific Ry. Co. vs. Abilene Cotton Oil Company*, 204 U. S., 426; *Baltimore and Ohio R. R. Co. vs. United States, Ex Rel. Pitcairn Coal Co.*, 215 U. S., 481.

There is thus presented for decision, with little if any aid from previous deliverance by the courts, the original question which divided the Interstate Commerce Commission in this case and in the case of *Vulcan Coal and Mining Company vs. I. C. R. R. Co.*, 33 I. C. C., 52, whether the duty imposed upon a carrier to provide and furnish cars to the shipper is the duty imposed by the common law or is a different and a broader duty prescribed by the statute, and whether the power of the Interstate Commerce Commission to prevent undue preference and unjust discrimination in the use of a carrier's cars has been enlarged and expanded into a power to control the "practices" of carriers, by determining and prescribing the type and character of "all (their) instrumentalities and facilities of shipment or carriage," in order to procure for the shipper a better, safer, and more economic transportation service.

In seeking the authority of the commission to make the order in controversy, we have nothing to do with the merit of the order, the injustice of the practice found to exist, or the wisdom of the practice established (*Texas and Pacific Ry. Co. vs. I. C. C.*, 162 U. S., 197, 219; *I. C. C. vs. Alabama Midland Ry. Co.*, 168 U. S., 144, 170), nor have we anything to do with the effect of the order upon private car lines. We are concerned only with the law under which the order was made and the commission acted, assuming its findings of fact to be conclusively correct. *I. C. C. vs. Illinois Central Ry. Co.*, 250 U. S., 452; *Baltimore and Ohio Railroad Co. vs. United States, Ex Rel. Pitcairn Coal Co.*, 215 U. C., 481; *Pennsylvania Company vs. United States*, 236 U. S., 351, 361.

The question of the duty of the carrier and the correlative question of the commission's power to enforce the performance of that duty, as they are presented in this case, had their rise in a change
73 in the definition of the term "transportation" made by the

amendment of 1906. Section 1 of the original act prescribed that "the term 'transportation' shall include all instrumentalities of shipment or carriage." Instrumentalities of shipment of course include cars, and cars have been treated as such from the date of the act to the date of its amendment in 1906. But in *Scofield vs. Lake Shore and Michigan Southern Railway Co.*, 4 I. C. C., 158, 2 I. C. R., 67, 76, the Interstate Commerce Commission considered that the sole duty of a carrier to furnish cars was that imposed by the common law, and that the statute creating the commission did not clothe it with power to determine the instrumentalities of shipment to be employed by a carrier or to require a carrier to use in its business the kind and number of cars which the commission may deem necessary for a proper car service. In discussing this case the commission said that "the power, if it should be held to exist at all, on the part of the Interstate Commerce Commission to require a carrier to furnish tank cars when that carrier is furnishing none whatever in its business, would apply equally to sleeping cars, parlor cars, fruit cars, refrigerator cars, and all manner of cars as occasion might require, and would be limited only to the necessities of interstate commerce and the discretion of the Interstate Commerce Commission. A power so extraordinary and so vital, reached by construction, could not justly rest upon any less foundation than that of direct expression or necessary implication, and we find neither of these in the statute."

It is contended, however, that by the amendatory act of 1906, changing the definition of the term "transportation," there is such direct statutory expression conferring such extraordinary power, and that the measure of duty theretofore resting upon the carrier to furnish cars was changed from a common-law duty, with resort to the courts for its violation, to a statutory duty, with redress for its violation by the Interstate Commerce Commission. The act of 1906, as before quoted, prescribes that "the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage" and certain defined services to be rendered in connection therewith. The services defined are the principal additions to the definition and relate to the receipt, delivery, transfer, ventilation, refrigeration, storage, and handling of property transported. With these we have nothing to do in this case, 74 except to note that they constitute the principal, if not the entire, additions to the old definition and are subject matters of the commission's control not embraced in the original act. While the word "cars" was not used in the definition of transportation as contained in the original act, it has never been doubted that in the words "instrumentalities of shipment" and within the term "transportation" cars were included.

The definition of the term "transportation," as it appears in the amendment of 1906, so far as it relates to cars does nothing more than express what was implied in the original definition and contains nothing which suggests that in furnishing transportation there shall

rest upon the carrier a duty to furnish cars of a kind different from those required of the carrier under the original act.

We find no case prior to the amendatory act of 1906 which questioned that cars were "instrumentalities of shipment or carriage." If such a question existed, then the act of 1906, naming cars as one of the instrumentalities of shipment, might have been a change with a purpose, creating a difference in legal effect.

In seeking the effect of the amendment of 1906, inquiry may be made with respect to the purpose of Congress in enacting it. It is apparent from the addition to the definition of "transportation" contained in the amendment that Congress intended and clearly succeeded in including within that term certain services which theretofore had not been embraced within it and over which Congress deemed it advisable that the Interstate Commerce Commission should have power and control. These were ventilation, refrigeration, icing, storage, and handling of property transported. This power was conferred upon the commission for the avowed purpose, among others, of relieving the shipper of the task and annoyance of dealing with more than one person. These were new matters and therefore were additions to what was meant by transportation as defined in the original act. But the addition of the word "cars" in the amendment made no addition to the definition in the original act, because cars were already embraced within it.

We find nothing in the original or amended act which by express language imposes upon a carrier the extraordinary duty or
75 confers upon the Interstate Commerce Commission the extraordinary power claimed by the Government in this proceeding. If they exist, they can be found only by implication, and it is doubtful if Congress would leave to implication an intention to impose so onerous a duty and to grant so great a power. On the other hand, we find in the act, by clear expression, duties imposed upon carriers which are not absolute in their nature, but are qualified by the ability of the carriers to conform to the duties prescribed.

The provision of the act requiring a carrier to maintain and operate switch connections with lateral or branch line railroads, appearing in the last paragraph of the first section of the act, imposes upon a carrier the duty to "furnish cars for the movement of such traffic *to the best of its ability* without discrimination in favor of or against any such shipper." The words "to the best of its ability," of course, qualify the duty to maintain switch connections and do not qualify the prohibited discrimination.

Again, in section 3 of the act, it is provided that "every common carrier * * * shall, *according to their respective powers*, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and for receiving, forwarding, and delivering of passengers and property." Here, again, the carriers' duty to provide and furnish facilities of transportation is not absolute. The duty is laid upon them "according to their respective

powers." Such expressions rather raise the implication that Congress did not intend to place an absolute and unqualified duty upon carriers to furnish cars of a certain type whether they had them or not, and if they did not have them, then to acquire them, whether they had the money or not. Restricting our construction of the act to its words and finding nothing by implication that changes or qualifies their meaning, we are of opinion that the amendment of 1906 including cars within the definition of "transportation" added nothing to the original duty of the carrier as prescribed by the original act and as interpreted by the commission and vested in the commission no increase of power over cars as instrumentalities of shipment. If, under the act as amended, no different or greater

76 duty is imposed upon a carrier with respect to furnishing and providing cars than was prescribed by the original act, then the practice of the carrier found unlawful in this case was not in violation of the statute, and the order of the commission directing the carrier to desist from that practice was an exercise of power not conferred by law.

The act to regulate commerce does not confer upon the Interstate Commerce Commission all power over cars and other instrumentalities of shipment. Congress has reserved unto itself and from time to time has exercised power to control and regulate certain instrumentalities of shipment, notably by the acts establishing the standard height of drawbars, prescribing safety appliances, and regulating the hours of service of the carriers' employees. But, aside from special enactments of this class, Federal legislation regulating commerce, in so far, at least, as it is contained in the act of 1887 and its amendments, has thus far left carriers free to exercise their own judgment in the purchase, construction, and equipment of their roads and in the selection of their rolling stock. By this legislation Federal control has been assumed over the use to which the carriers' roads and equipment are put, to the end that the flow of commerce in the employment of those instrumentalities may not be impeded and that unjust rates shall not be charged and unfair practices pursued to the injury of persons and localities. The law clearly confers upon the commission power to so regulate the use of the facilities possessed by the carrier that there shall be no unjust discrimination, but we find nothing in the law which confers upon the commission power to compel a carrier to acquire facilities it does not possess or to acquire better facilities than those it possesses, not with the object of preventing discrimination and preferences, but in order that the shipper may have larger, better, and, perhaps, more economical facilities. We are of opinion that in making the order the Interstate Commerce Commission exceeded its statutory power and that the order should be suspended and annulled in accordance with the prayer of the petition.

Thomson, district judge, dissents.

77 In the District Court of the United States for the Western District of Pennsylvania.

PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT,

vs.

UNITED STATES OF AMERICA AND CREW-LEVICK Company, a corporation of the Commonwealth of Pennsylvania, defendants.

PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT,

vs.

UNITED STATES OF AMERICA AND PENNSYLVANIA PARAFFINE WORKS, a corporation of the Commonwealth of Pennsylvania, defendants.

Filed Nov. 9th, 1915. J. Wood Clark, clerk.

THOMSON, J. (dissenting):

Finding myself unable to concur in the conclusion reached by the majority of the court, I have thought proper, in view of the importance of the case, to briefly assign the reasons which control my judgment.

We have nothing to do with the wisdom of the order. The findings of the commission are presumed to be true and to have justified its action, if only the power to exercise it exists. On this question of power alone the commission was divided. If there rested no legal duty on the carrier to provide the transportation called for, it follows that the commission was without power to make the order in question. The conclusion of the court adverse to the action of the commission is concisely set forth in the concluding portion of the majority opinion thus:

"The law clearly confers upon the commission power to so regulate the use of the facilities possessed by the carrier that there shall be no unjust discrimination, but we find nothing in the law which confers upon the commission power to compel a carrier to acquire facilities it does not possess or to acquire better facilities than those it possesses, not with the object of preventing discrimination and preference, but in order that the shipper may have larger, better, and perhaps more economical facilities."

This is the issue, and the solution of the question must be found mainly in the proper interpretation of the term "transportation" as used in the amendment of 1906.

In the original act of February 4, 1887, it is said: "The term 'transportation' shall include all instrumentalities of shipment or carriage." These words are clearly comprehensive enough to include cars as an instrument of shipment. But we need not stop to conjecture as to their full breadth and meaning. It is sufficient that Congress thought proper to enlarge the scope of the term "transportation" as used in the amendment of 1906.

tation" by providing in the of 1906 as follows: "The term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage and handling of property transported, and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto." This, instead of being a concise and accurate definition of the term "transportation," is rather a legislative declaration of what the term shall include. Much broader than the words, "all instrumentalities of shipment and carriage" in the original act, are the words of the amendment, "cars and other vehicles and all instrumentalities and facilities of shipment or carriage." The very comprehensive word *facilities* of shipment and carriage was a significant addition to the original act. These words are again made more comprehensive by the words which follow, "irrespective of ownership or of any contract, express or implied, for the use thereof." Whether held by the carrier by purchase, hire, exchange, lease, bailment, or any contract for their use, express or implied, they are to be regarded as the instruments of the carrier, and the shipper, as well as the commission, is thus relieved of the annoyance of dealing with more than one person. The scope of the term transportation is again enlarged by the use of the words, "and all service in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported." Having thus defined transportation, it is then declared to be the duty of every carrier, subject to the provisions of the act, to provide and furnish such transportation upon reasonable request therefor.

79 Whatever may have been the duty resting on a carrier at common law to furnish transportation of the shipper's property, it admits of no doubt that the furnishing of transportation, as defined by the act, has been made a clear statutory duty of the carrier. As was said by Chief Justice White in *Chicago, R. I. & Pac. R. R. Co. v. Hardwick Elevator Co.*, 226 U. S., 426:

"The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is, of course, by these provisions clearly declared. * * * Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty."

It is plainly the duty of the carrier not only to furnish cars on reasonable request, but to furnish cars reasonably suitable for the proper

transportation of the freight to be shipped. This general proposition is stated by Hutchinson on Carriers, sec. 536, as follows:

"If the goods are of such a nature as to require for their protection some other kind of car than that required for ordinary goods, and cars adapted to the necessity are known and in customary use by carriers, it is the duty of the carrier, where he accepts the goods, to provide such cars for their carriage."

In *Covington Stock Yards Co. v. Keith*, 139 U. S., 128. Justice Harlan, speaking for the Supreme Court, said:

"The railroad company, holding itself out as a carrier of live stock, was under a legal obligation arising out of the nature of its employment to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in respect to such matters is whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public."

In the same opinion the court says:

"The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered."

This case, assuming that proper facilities for the transportation of the stock must be furnished, goes further and extends the duty of the carrier to providing suitable means for its receipt and discharge.

If, then, it is the duty of the carrier on reasonable request to furnish coal cars to the shipper of coal, stock cars to the shipper of live stock, fruit cars, with refrigeration, for the shipper of fruit, on no principle could the oil shipper be denied cars reasonably
80 suited for the shipment of oil. The word "reasonable," as

used in the act, is a qualifying and saving term. Not merely the demands and needs of the shipper are to be considered but the circumstances of the carrier and the rights of the public as well. The fitness and efficiency of the transportation requested, whether the facilities of shipment would be made better and more economical, the public advantage to be derived therefrom, the cost and expense in relation to the benefit resulting, all the circumstances, time, and place, and means as affecting the carrier and its ability to supply the transportation demanded—these and all other relevant matters may be considered in determining the reasonableness of the shipper's demand. If the request be reasonable, it is the legal duty of the carrier to comply with it; if unreasonable, no such duty devolves upon the carrier. And this question of fact, in case of dispute, the commission must decide. Almost all duties are relative rather than absolute, and the exercise of a clearly vested power largely depends upon the facts which call for its exercise. Even the clearly expressed duty of the carrier to furnish cars on reasonable request is not absolute. *Hampton v. St. L., Iron Mt. & S. Ry.*

Co., 227 U. S., 467. Thus the right of the shipper to demand transportation, on the one hand, is conditioned on the fact that his request be reasonable, and the duty, on the other, to comply is not absolute but dependent on the facts of the case. We are not passing on some abstract proposition as to the power of the commission to order, without restraint, the equipment and furnishing of cars, without reference to conditions or circumstances. We are passing on a concrete question based on specific facts, conclusively found by the commission. It would be easy to imagine on the part of a shipper an unwarranted and unreasonable request and on the part of the carrier an arbitrary and unjust denial of a reasonable demand. The Interstate Commerce Commission is the tribunal standing between the parties, with power to hear and determine, and especially competent by reason of experience to determine with justness and uniformity of decision.

I can not agree with the proposition that the duty imposed upon the carrier to furnish cars is limited to those which the carrier may have on hand, or that there is no obligation to acquire facilities it does not possess, or to acquire better facilities to meet the reasonable demands of the shippers. I base my conclusion on words of the act itself, "it shall be the duty of every carrier subject to the provisions of this act, to provide and furnish such transportation on reasonable request therefor." No words more specific or definite than "provide and furnish" could have been chosen. I find no limitation of any kind in the act upon the duty thus imposed upon the carrier, except only that the request therefor be reasonable. There are no words from which it can fairly be assumed that existing ownership or control is a prerequisite to the carrier's duty to provide and furnish. From the explicit words of the act, it would seem to follow that if a reasonable request is made for cars and the carrier does not possess them, it must acquire them for use by one of the many methods for their acquisition. If not, this most important provision of the statute would be rendered largely nugatory. Perhaps the most effective blow which Congress could deal at discrimination in interstate traffic is the duty imposed on the carrier to furnish transportation. There could be no more prolific source of discriminating practices than the right in the carrier to grant or withhold the means of transportation at its discretion. The demands of the favored shipper would be met by promptly acquiring and furnishing the transportation called for. We do not have what you demand, would be a conclusive answer to the less favored. The flow of commerce is more vital to the public than that commerce should flow unimpeded. That transportation be furnished is more vital than that it be free from discrimination and preference. If the primary object of the act is to prevent discrimination, Congress evidently realized that the most effective method of prevention is to remove the opportunity for discrimination. We must assume that if Congress had intended to set limitations on that duty, it would have done so in apt words, as it did

with reference to other provisions of the act. For instance, the duty of the carrier to construct and operate switch connections with any lateral branch line of railroad or private side track is conditioned that such connection is reasonably practicable, and can be put in with safety, and will furnish sufficient business to justify the connection and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability.

82 Again, the carrier's duty to furnish facilities for the interchange of traffic between their respective lines is qualified by the expression, "according to their respective powers." It is highly significant, therefore, that the more important duty to furnish transportation has no limitation or condition, except upon the reasonable request of the shipper.

If the wisdom of the order in question, or its necessity, needed justification, it appears in the conclusive findings of the commission that 91% of the refined oil of the country is shipped in tank cars at a great economic gain. I would therefore dismiss the petition of the complainant company.

83 In the District Court of the United States for the Western District of Pennsylvania. November Term, 1915.

THE PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT,
v.

UNITED STATES OF AMERICA, DEFENDANT; INTERSTATE
Commerce Commission and the Crew-Levick Com-
pany, a corporation, intervening defendants.

In Equity.
No. 39.

Interlocutory decree enjoining order of Interstate Commerce Commission.

Filed Nov. 13", 1915. J. Wood Clark, clerk.

And now—to wit, this 13th day of November, 1915—at Pittsburgh, this cause came on for hearing before Circuit Judge Victor B. Woolley and District Judges Charles P. Orr and W. H. Seward Thomson on the application for an interlocutory injunction and the motions to dismiss, and the same were argued by counsel and submitted to the court. On consideration whereof it was ordered, adjudged, and decreed as follows:

First. That the motion of the United States of America, defendant, to dismiss the petition be, and the same is hereby, overruled.

Second. That the motion of the Interstate Commerce Commission, intervening defendant, to dismiss the petition be, and the same is hereby, overruled.

Third. That the application of the complainant for an interlocutory injunction be, and the same is hereby, granted, as prayed in the petition, and that an interlocutory injunction be, and the same

84 is hereby, issued out of this court, enjoining, annulling, and suspending the order of the Interstate Commerce Commission in the case of Pennsylvania Paraffine Works v. Pennsylvania Railroad Company, No. 5574 and the Crew-Levick Company v. Pennsylvania Railroad Company, No. 5574 (Sub. No. 1), entered at a general session of the Interstate Commerce Commission at its office in Washington, D. C., on the 11th day of May, A. D. 1915, and that the said defendants, and each of them, their officers, members, examiners, agents, and attorneys, and any and all persons whomsoever be enjoined and restrained from enforcing, or in any manner attempting to enforce or carry out the said order or the terms thereof until the further order of the court.

By the Court:

CHARLES P. ORR,
*United States District Judge,
Western District of Pennsylvania.*

To which said order or decrees the defendants, and each of them, by their respective counsel, severally object and except.

CHARLES P. ORR,
*Judge U. S. District Court,
Western District of Pennsylvania.*

85 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT,
v.

UNITED STATES OF AMERICA, DEFENDANT, INTERSTATE Commerce Commission and the Crew-Levick Com- pany, a corporation, intervening defendants.	}	In Equity. No. 39.
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Filed Dec. 7, 1915. J. Wood Clark, clerk.

Petition for appeal.

United States of America, defendant, Interstate Commerce Commission and the Crew-Levick Company, a corporation, intervening defendants, feeling themselves aggrieved by the interlocutory order or decree of the district court, entered November 13, 1915, pray an appeal to the Supreme Court of the United States from the said interlocutory order or decree.

The particulars wherein said defendant and the intervening defendants consider said interlocutory order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

And the said defendant and the intervening defendants pray that a transcript of the record, proceedings, and papers on which the

said interlocutory order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

E. LOWRY HUMES,
United States Attorney, Western District of Pennsylvania.
 BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
 JOS. W. FOLK,
Solicitor for the Interstate Commerce Commission.
 GEORGE E. SPRING AND CHAS. D. CHAMBERLIN,
Solicitors for the Crew-Levick Company, a Corporation.

86 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT,

v.

UNITED STATES OF AMERICA, DEFENDANT, INTERSTATE Commerce Commission and the Crew-Levick Company, a corporation, intervening defendant.

In Equity.
 No. 39.

Filed Dec. 7, 1915. J. Wood Clark, clerk.

Assignment of errors.

United States of America, defendant, Interstate Commerce Commission and the Crew-Levick Company, a corporation, intervening defendants, now come, by their respective counsel, and, in connection with their petition for appeal, file the following assignment of errors on which they will rely on said appeal to the Supreme Court of the United States from the interlocutory order or decree of the district court, entered November 13, 1915, in the above-entitled cause.

The district court erred:

I.

In overruling the motion of the United States to dismiss the petition on the various grounds set forth in the said motion, and in not sustaining the said motion.

II.

In overruling the motion of the Interstate Commerce Commission to dismiss the petition on the various grounds set forth in the said motion, and in not sustaining the said motion

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III.

In granting the interlocutory injunction enjoining the order of the Interstate Commerce Commission entered May 11, 1915, on complaint of Pennsylvania Paraffine Works v. Pennsylvania Railroad Company, No. 5574, and the Crew-Levick Company v. Pennsylvania

Railroad Company, No. 5574 (Sub. No. 1), and suspending the force and effect of the same, for that the petition of the complainant (a) does not set forth any cause of action and is insufficient to warrant the granting of the interlocutory injunction or to form the basis for any relief from the said order; (b) nor has the complainant shown that there is any equity in the said petition on which to grant the interlocutory injunction or to form the basis for any relief from the said order; (c) nor has the complainant shown that in making its said order the Interstate Commerce Commission acted beyond or without its jurisdiction or exceeded any power or authority conferred on it by the act to regulate commerce; (d) nor has the complainant shown that in making its said order the Interstate Commerce Commission violated any right of the said complainant protected by the Constitution of the United States or any other right of the said complainant over which this court may exercise jurisdiction.

IV.

In holding and adjudging that the Interstate Commerce Commission was and is without power and authority to enter the order in the case of *Pennsylvania Paraffine Works v. Pennsylvania Railroad Co.*, No. 5574, and the *Crew-Levick Co. v. Pennsylvania Railroad Co.*, No. 5574 (Sub No. 1), entered at a general session of the Interstate Commerce Commission at its office in Washington on the 11th day of May, A. D. 1915.

V.

In entering the following decree:

"That the application of the complainant for an interlocutory injunction be, and the same is hereby, granted, as prayed in the petition, and that an interlocutory injunction be, and the same is hereby, issued out of this court, enjoining, annulling, and suspending the order of the Interstate Commerce Commission in the case of *Pennsylvania Paraffine Works v. Pennsylvania Railroad Company*, No. 5574, and the *Crew-Levick Company v. Pennsylvania Railroad Company*, No. 5574 (Sub No. 1), entered at a general session of the Interstate Commerce Commission at its office in Washington, D. C., on the 11th day of May, A. D. 1915, and that the said defendants and each of them, their officers, members, examiners, agents, and attorneys, and any and all persons whomsoever, be enjoined and restrained from enforcing, or in any manner attempting to enforce or carry out, the said order or the terms thereof until the further order of the court."

VI.

In finding and deciding as follows:

"We find nothing in the original or amended act which, by express language, imposes upon a carrier the extraordinary duty or confers upon the Interstate Commerce Commission the extraordinary

power claimed by the Government in this proceeding. If they exist, they can be found only by implication, and it is doubtful if Congress would leave to implication an intention to impose so onerous a duty and to grant so great a power."

VII.

In finding and deciding as follows:

"The carriers' duty to provide and furnish facilities of transportation is not absolute. The duty is laid upon them 'according to their respective powers.'

89 "Such expressions rather raise the implication that Congress did not intent to place an absolute and unqualified duty upon carriers to furnish cars of a certain type whether they had them or not, and if they did not have them then to acquire them whether they had the money or not. Restricting our construction of the act to its words, and finding nothing by implication that changes or qualifies their meaning, we are of opinion that the amendment of 1906, including cars within the definition of 'transportation,' added nothing to the original duty of the carrier as prescribed by the original act and as interpreted by the commission and vested in the commission no increase of power over cars as instrumentalities of shipment. If, under the act as amended, no different or greater duty is imposed upon a carrier with respect to furnishing and providing cars than was prescribed by the original act, then the practice of the carrier found unlawful in this case was not in violation of the statute, and the order of the commission directing the carrier to desist from that practice was an exercise of power not conferred by law."

VIII.

In finding and deciding as follows:

"We find nothing in the law which confers upon the commission power to compel a carrier to acquire facilities it does not possess or to acquire better facilities than those it possesses, not with the object of preventing discrimination and preferences, but in order that the shipper may have larger, better, and perhaps more economical facilities. We are of opinion that in making the order the Interstate Commerce Commission exceeded in statutory power, and that the order should be suspended and annulled in accordance with the prayer of the petition."

IX.

In finding and deciding that:

"In none of them (cases subsequently cited in the opinion) was the question raised or decided nor in any did the Supreme Court reveal its opinion as to whether there devolved upon a carrier a statutory duty to provide and furnish transportation of a type it did not possess, or to acquire such transportation in order to provide and furnish the same upon reasonable request."

X.

90 In not finding and deciding that it is plainly the duty of the carrier not only to furnish cars on reasonable request, but to furnish cars reasonably suitable for the proper transportation of the freight to be shipped.

XI.

In not denying the application for interlocutory injunction and dismissing the petition.

Wherefore, defendants, and each of them, pray that the said interlocutory order or decree of the district court, entered November 13, 1915, be reversed, annulled, and set aside, with directions that the petition be dismissed, and for such other and further order as may be appropriate.

E. LOWRY HUMES,

United States Attorney, Western District of Pennsylvania.

BLACKBURN ESTERLINE,

Special Assistant to the Attorney General.

JOS. W. FOLK,

Solicitor for Interstate Commerce Commission.

GEORGE E. SPRING and

CHAS. D. CHAMBERLIN,

Solicitor for the Crew-Levick Company, a Corporation.

91 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, COM-
plainant,

v.

UNITED STATES OF AMERICA, DEFENDANT, INTER-
state Commerce Commission and the Crew-
Levick Company, a corporation, intervening
defendants.

In Equity. No. 39.

Filed Dec. 7, 1915. J. Wood Clark, clerk.

Order allowing appeal.

In the above-entitled cause United States of America, defendant, Interstate Commerce Commission and the Crew-Levick Company, a corporation, intervening defendants, having made and filed their petition praying an appeal to the Supreme Court of the United States from the interlocutory order or decree of the district court, entered November 13, 1915, and having also made and filed an as-

signment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided:

It is ordered and decreed that the said appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof; and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered to the Supreme Court of the United States.

CHAS. P. ORR,
*United States District Judge,
Western District of Pennsylvania.*

92 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, COM-
plainant,
v.

UNITED STATES OF AMERICA, DEFENDANT, INTER-
state Commerce Commission and the Crew-
Levick Company, a corporation, intervening
defendants. } In Equity. No. 39.

Filed Dec. 7, 1915. J. Wood Clark, clerk.

Præcipe for record.

To the Clerk:

You will please prepare and certify a transcript of the entire record in the above-entitled cause to be filed in the office of the clerk of the Supreme Court of the United States on the appeal from the interlocutory order or decree of the district court entered November 13, 1915, and include in said transcript all of the pleadings, exhibits, notices, appearances, motions, orders, decrees, journal entries, appeal papers, and any other papers on file or of record in said cause.

E. LOWRY HUMES,
*United States Attorney,
Western District of Pennsylvania.*

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

JOS. W. FOLK,
*Solicitor for the Interstate
Commerce Commission.*

GEORGE E. SPRING, and
CHAS. D. CHAMBERLIN,
*Solicitors for the Crew-Levick
Company, a Corporation.*

*Citation on appeal.*UNITED STATES OF AMERICA, *ss.**To the Pennsylvania Railroad Company, greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to an appeal duly allowed and filed in the Clerk's office of the United States District Court, Western District of Pennsylvania, wherein United States of America, Interstate Commerce Commission, and the Crew-Levick Company, a corporation, are appellants, and you are appellee, to show cause, if any there be, why the interlocutory order or decree rendered against said appellants in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles P. Orr, United States district judge, Western District of Pennsylvania, this 7th day of December, 1915.

CHAS. P. ORR,
*United States District Judge,
Western District of Pennsylvania.*

Service of a copy of the within citation is hereby admitted this 7th day of December, 1915.

HENRY WOLF BIKLE,
THOS. PATTERSON,
*Solicitors for the Pennsylvania
Railroad Company, Appellee.*

94 In the district court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT, }
v.

UNITED STATES OF AMERICA, DEFENDANT, INTERSTATE } *In Equity.*
Commerce Commission and the Crew-Levick Com- } *No. 39.*
pany, a corporation, intervening defendants.

Filed Dec. 14th, 1915. J. Wood Clark, Clerk.

To the honorable Francis Shunk Brown, attorney general of the State of Pennsylvania:

You are hereby notified that the above-entitled cause was this day appealed to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty (30) days from this date.

This notice is given you pursuant to chapter 32, at pages 220 and 221, of the statutes of the United States, passed at the 1st session of the 63d Congress, 1913.

December 7, 1915.

E. LOWRY HUMES,
*United States Attorney,
Western District of Pennsylvania.*

I hereby acknowledge receipt of a copy of the above notice this date of December, A. D. 1915.

WM. M. HARGEST,
Deputy Attorney General of the State of Pennsylvania.

95 *Certificate of exemplification.*

In the District Court of the United States for the Western District of Pennsylvania.

PENNSYLVANIA RAILROAD CO.	} No. 39. Nov. Term, 1915. In equity.
<i>vs.</i>	
UNITED STATES OF AMERICA.	

WESTERN DISTRICT OF PENNSYLVANIA, ss:

I, J. Wood Clark, clerk of the District Court of the United States for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record on appeal in the above-entitled case, so full and entire as the same remains of record and on file in my office, in the city of Pittsburgh, in said district.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 31st day of Dec., A. D. 1915.

[SEAL.]

J. WOOD CLARK, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, ss:

I, W. H. S. Thomson, district judge of the United States for said district, do hereby certify that J. Wood Clark, above named, was, at the time of making the above certificate and is now, clerk of the said court and that the said certificate made by him is in due form of law.

W. H. S. THOMSON,
U. S. District Judge.

PITTSBURGH, Dec. 31st, 1915.

WESTERN DISTRICT OF PENNSYLVANIA, ss:

I, J. Wood Clark, clerk of the District Court of the United States for the Western District of Pennsylvania, do certify that the Honorable W. H. S. Thomson, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was, at the time of making thereof and still is, judge of the District Court of the United States in and for said district, duly commissioned and quali-

fied, to all whose acts, as such, full faith and credit are and ought to be given as well in the courts of judicature as elsewhere.

In testimony wherefore I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, in said district, this 31st day of Dec., A. D. 1915.

[SEAL.]

J. WOOD CLARK, *Clerk.*

96

Citation on appeal.

UNITED STATES OF AMERICA, ss:

To the Pennsylvania Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to an appeal duly allowed and filed in the clerk's office of the United States District Court, Western District of Pennsylvania, wherein United States of America, Interstate Commerce Commission, and the Crew-Levick Company, a corporation, are appellants and you are appellee to show cause, if any there be, why the interlocutory order or decree rendered against said appellants in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles P. Orr, United States District Judge, Western District of Pennsylvania, this 7th day of December, 1915.

CHAS. P. ORR,
*United States District Judge,
Western District of Pennsylvania.*

Service of a copy of the within citation is hereby admitted this 7th day of December, 1915.

HENRY WOLF BIKLE,
THOS. PATTERSON,
*Solicitors for the Pennsylvania
Railroad Company, Appellee.*

97 (Indorsed:) No. 39. Nov. T., 1915. In equity. In the District Court of the United States for the Western District of Pennsylvania. The Pennsylvania Railroad Company, complainant, vs. United States of America, defendant, Interstate Commerce Commission and the Crew-Levick Company, a corporation, intervening defendants. Citation on appeal.

(Indorsed:) File No. 25074. W. Pennsylvania D. C. U. S. Term No. 791. The United States, Interstate Commerce Commission, and the Crew-Levick Company, appellants, vs. The Pennsylvania Railroad Company. Filed January 5th, 1916. File No. 25074.

In the Court of Claims of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES ET AL., APPELLANTS,	}	No. 790.
<i>v.</i>		
THE PENNSYLVANIA RAILROAD COMPANY.		
THE UNITED STATES ET AL., APPELLANTS,	}	No. 791.
<i>v.</i>		
THE PENNSYLVANIA RAILROAD COMPANY.		

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and in accordance with the provisions of section 2 of the act of June 16, 1910 (36 Stat. 542), and the urgent deficiency act of October 22, 1913 (38 Stat. 208, 220), moves the court to advance the above-entitled causes for joint hearing on a day convenient to the court at the next term.

These are appeals from orders of the District Court of the United States for the Western District of Pennsylvania annulling an order of the Interstate Commerce Commission.

The question involved is whether under the act to regulate commerce it is within the power of the Interstate Commerce Commission to compel railroad com-

mon carriers to furnish "tank cars" to shippers on their lines for the transportation of large quantities of oil.

The case is of importance because other cases in which the same question is involved are pending before the Commission, and for that reason an early determination thereof by this court is desirable.

Opposing counsel and all parties in interest concur in this motion.

JOHN W. DAVIS,
Solicitor General.

APRIL, 1916.

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THE OIL TANK CAR CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS, <i>v.</i> THE PENNSYLVANIA RAILROAD COMPANY.	}	No. 340.
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THE UNITED STATES, INTERSTATE COM- MERCE COMMISSION, AND THE CREW- LEVICK COMPANY, APPELLANTS, <i>v.</i> THE PENNSYLVANIA RAILROAD COMPANY.	}	No. 341.
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*APPEALS FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF PENNSYL-
VANIA.*

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASES.

These cases involve the power of the Interstate Commerce Commission to require railroads to provide and furnish, upon reasonable demand, an adequate number of cars for interstate transportation. They present to this court for decision for the

first time the question whether violation of the established duty of a common carrier to provide and furnish cars may be remedied by order of the Commission, or solely by suit in the courts.

The two cases are appeals by the United States from interlocutory injunctions issued by the District Court of the United States for the Western District of Pennsylvania on November 13, 1915 (R. 58, No. 341; 227 Fed. 911) enjoining the enforcement of an order of the Interstate Commerce Commission of May 11, 1915, which was as follows (R. 35, 36, No. 341; 34 I. C. C. 179):

It is ordered, That the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist, on or before August 15, 1915, and thereafter to abstain, from refusing upon reasonable request and reasonable notice therefor to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the act to regulate commerce and amendments thereto.

It is further ordered, That said defendant be, and it is hereby, notified and required to provide, on or before August 15, 1915, and thereafter to furnish, upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

And it is further ordered, That this order shall continue in force for a period of not less than two years from the date when it shall take effect.

The decision of the District Court went wholly on the merits and was based on the want of jurisdiction of the Commission. The appeal by the Government from the interlocutory injunction, therefore, is proper. Act approved October 22, 1913, c. 32, 38 Stat. 208, 220; *Pipe Line Cases*, 234 U. S. 548, 558; *Louisville & Nashville R. R. Co. v. United States*, 238 U. S. 1, 10.

THE STATUTES.

The assertion of jurisdiction by the Commission is based particularly upon the following portions of the Act to Regulate Commerce as amended in 1889, 1906, and 1910. Section 1 of the act as amended June 29, 1906, c. 3591, 34 Stat. 584, and June 18, 1910, c. 309, 36 Stat. 539, 545, provides:

* * * and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor * * *.

And it is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful.

Section 12 of the act as amended March 2, 1889, c. 382, 25 Stat. 855, 858, provides:

* * * and the commission is hereby authorized and required to execute and enforce the provisions of this act.

Section 15 of the act as amended (36 Stat. 551) provides:

That whenever, after full hearing upon a complaint made as provided in section 13 of this act, or after full hearing under an order for investigation and hearing made by the commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds the same to exist,

and shall not thereafter publish, demand or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. * * *

* * * * *

(p. 554) The foregoing enumeration of powers shall not exclude any power which the commission would otherwise have in the making of an order under the provisions of this act.

THE FACTS.

The facts in the two cases are substantially the same. The cases were treated as one before the Commission and before the District Court. In addition to the facts set forth in the record in No. 340, it appears in No. 341 that the Crew-Levick Company obtained leave to intervene and filed answer, stating that it had become successor to the Pennsylvania Paraffine Works, and that the effective date of the Commission's order had been postponed for three months, or until November 15, 1915. Page references, unless otherwise noted, will be to the record in No. 341.

Transportation of oil in the United States is a bulk industry. The total of 250,000,000 barrels of crude oil annually produced in the United States is moved by pipe line, in barrels and tank cars. By far the greater portion of the refined oil, or 91 per cent, is shipped in tank cars. It is the customary

practice of railroads generally to transport oil in bulk, by means of tank cars. The Commission found:

* * * For a long time the bulk of the refined product has been shipped in tank cars, and at present 91 per cent of the refined oil produced in this country is transported in this manner.

* * * The tank cars now in common use for the transportation of oil have a capacity of from 6,000 to 12,000 gallons each. The cars are so constructed that they may be rapidly loaded at the refinery, and jobbers and dealers in the refined product throughout the country have the proper and necessary facilities for unloading tank cars by gravity at their various stations. Even the country grocer has his tank, which is filled from tank wagons. The tank wagons are filled from the oil dealer's storage tank, which in turn is filled from tank cars. (R. 20.)

The bulk of the movement of refined oil is in tank cars owned by the shippers. * * * The privately owned tank cars east of the Mississippi aggregate about 27,700, and the total number of tank cars owned in the United States was given as approximately 40,000. (R. 20, 21.)

The Commission made a finding that the railroad holds itself out to transport oil in tank cars. It publishes rates for the transportation of oil in tank cars, owns tank cars and leases them, and the rates published apply to shipments both in cars owned and leased (R. 26). It has been using such cars

for over 25 years (R. 20). The Commission said (R. 26, 27):

As bearing upon this point, it should first be stated that defendant holds itself out to transport oil in bulk. It not only publishes rates for the transportation of oil in tank cars, but owns tank cars and supplies shippers with them. It leases cars owned by companies engaged in refining oil and transports their products in those cars at the rates it publishes for the movement by rail of oil in tank cars. It certainly can not be contended that the transportation by rail of oil in bulk could be attempted safely in any equipment other than tank cars.

(R. 20) * * * In 1887 the Pennsylvania Railroad acquired 1,308 tank cars, some of which have subsequently been sold to independent refineries. Defendant now owns 499 tank cars, all that remain of those purchased in 1887, and 482 of which are furnished to shippers of oil located on its lines. The other railroads east of the Mississippi River own, in the aggregate, only 303 tank cars.

Tank cars for the transportation of refined products are a commercial necessity. The cost of transportation in barrels is prohibitive, and the shipper compelled regularly to use barrels must shortly go out of business. Quoting again from the Commission's report (R. 20):

The only other method of transporting oil by rail is in barrels or similar containers loaded in box cars. However, the cost to the purchaser of oil transported in barrels is from 3½

to $3\frac{3}{4}$ cents per gallon above the cost when transported in tank cars. * * * The price of lubricating oil is from $2\frac{1}{2}$ to 22 cents per gallon f. o. b. cars at complainants' works; that of burning oil from $4\frac{1}{2}$ to $5\frac{3}{4}$ cents per gallon, and of gasoline from $9\frac{1}{2}$ to $17\frac{1}{2}$ cents. It is evident that the addition of $3\frac{1}{2}$ cents per gallon to the cost of oil when transported in barrels makes that method of transportation prohibitive and that the refusal of the railroads to furnish an adequate supply of tank cars would tend to drive out of business refiners who are unable to supply themselves with enough tank cars to move their products. Even witnesses who appeared in defendant's behalf admitted that tank cars are an absolute necessity for the transportation of refined products, and that their use effects an economic gain.

The movement of petroleum in tank cars is not a dangerous operation, and preparation of the cars therefor requires no peculiar technical knowledge (R. 32, 33).

The Crew-Levick Company and the Pennsylvania Paraffine Works are refiners of crude oil, with works at Warren, Pa., and at Titusville, Pa., respectively, both located on the line of the Pennsylvania Railroad Company. They have ample sidings and connections with defendant's railway for the delivery and loading of tank cars (R. 20). The Pennsylvania Paraffine Works during 1913 and 1914 had been refining about 20,000 barrels of crude oil per month, and the Glade Oil Works, operated by the Crew-

Levick Company, from 15,000 to 16,000 barrels per month. In 1913 the shipments from the Pennsylvania Paraffine Works averaged over 750,000 gallons per month, 91 per cent of which moved in tank cars, $1\frac{1}{2}$ per cent in barrels, and $7\frac{1}{2}$ per cent in pipe lines. During the same period, of the shipments from the Glade Oil Works, amounting to over 500,000 gallons per month, 86.8 per cent were in tank cars, 4.7 per cent in barrels, and 8.5 per cent in pipe lines (R. 19).

On March 9, 1910, the Pennsylvania Paraffine Works demanded of the railway company tank cars necessary for the transportation of its product. The railroad furnished cars but in insufficient number. On November 11, 1912, the Pennsylvania Paraffine Works by formal notice requested of the defendant sufficient tank cars to ship 450,000 gallons of oil per month, and the Crew-Levick Company requested sufficient to ship 600,000 gallons per month. To these requests the railroad company answered as follows (R. 21):

“We beg to say that the railroad company is not prepared to increase its present tank-car equipment, but is prepared to transport the commodity, when properly contained in barrels or other similar containers, at rates that are fair and reasonable and nondiscriminatory.”

The refiners thereafter filed complaints with the Interstate Commerce Commission alleging that the supply of oil tank cars furnished by the railroad was inadequate and praying for an order requiring the railroad to furnish cars as requested. The Commis-

sion, after extended hearing, found that the equipment provided and the cars furnished were inadequate and in violation of the legal duty imposed by the Interstate Commerce Act as amended. Jurisdiction to make the order now in question was examined and sustained. Three commissioners dissenting were of opinion that relief must be sought in the courts.

It appeared that the destinations of practically all of the refiners' shipments were points on the line of the railroad company (R. 21). The Commission pointed out that the order did not necessarily require the purchase of tank cars by the railroad company, but that they might be leased from private car lines if deemed desirable (R. 33).

The railroad on July 3, 1915, filed a petition to enjoin the enforcement of the order (R. 2, 6), contending that there was no duty either at common law or under the statute to furnish oil tank cars; that even if there were such legal obligation the Commission was not empowered to enforce it by order. Various subordinate objections to the order were made: (a) That it required sending of the railroad's cars to points beyond its own lines; (b) that the order was uncertain and indefinite; (c) that the order required tank cars owned by other refiners to be furnished to complainants; (d) that too short a time for compliance was granted. The railroad made no attack before the District Court upon the Commission's findings of fact.

The majority of the District Court held in accordance with the principal contentions of the railroad

company. (R. 46; 227 Fed. 911.) Thomson, district judge, delivered an able dissenting opinion (R. 54). The majority reasoned that prior to 1906 there was no statutory duty on the part of the railroad to furnish oil tank cars, and that the amendment of 1906 did not enlarge the railroad's obligations or the Commission's powers in this respect. The court said (R. 53):

* * * Such expressions rather raise the implication that Congress did not intend to place an absolute and unqualified duty upon carriers to furnish cars of a certain type whether they had them or not, and if they did not have them, then to acquire them, whether they had the money or not. Restricting our construction of the act to its words and finding nothing by implication that changes or qualifies their meaning, we are of opinion that the amendment of 1906 including cars within the definition of "transportation" added nothing to the original duty of the carrier as prescribed by the original act and as interpreted by the Commission and vested in the Commission no increase of power over cars as instrumentalities of shipment. If, under the act as amended, no different or greater duty is imposed upon a carrier with respect to furnishing and providing cars than was prescribed by the original act, *then the practice of the carrier found unlawful in this case was not in violation of the statute*, and the order of the Commission directing the carrier to desist from that practice was an exercise of power not conferred by law. [Italics ours.]

SPECIFICATIONS OF ERROR.

By assignments of error in various forms the Government raises for review the correctness of the rulings and decree of the District Court (R. 60-63). The Government contends that the railroad in this case was under a common-law obligation to furnish oil tank cars upon reasonable request; that since 1906 the statute has imposed the same obligation; and that the order in this case was within the powers of the Commission conferred by the Act to Regulate Commerce as amended. It is further contended that the various minor objections to the order are without merit. The principal issue, therefore, is: Has the Interstate Commerce Commission jurisdiction under the Act to Regulate Commerce as amended to order a common carrier subject to its provisions to provide and furnish upon reasonable request cars such as the carrier is accustomed and holds itself out to furnish?

BRIEF OF ARGUMENT.

I. The railroad is under a legal duty to furnish oil tank cars upon reasonable request.

1. The common law imposes the duty.

(a) The obligation of the railroad is not simply to devote its specific property on hand to the public use, but to render adequate transportation service.

(b) Additional equipment must be provided if necessary to accommodate reasonable public demands.

(c) Special facilities such as tank cars must be provided even though previously the railroad has not held itself out so to do.

(d) The railroad at bar, however, has held itself out specifically to carry oil in tank cars.

2. The duty is clearly imposed by the Hepburn Act of 1906.

(a) Recent decisions in this court recognize the obligation imposed.

(b) The evil to be remedied by the amendment of 1906 was in part the public injury due to insufficiency of the railroad's supply of tank and refrigerator cars.

(c) The history of the amendment of 1906 in the Halls of Congress shows that it was designed to meet this evil.

(d) The violation of legal duty in these cases is established.

II. The Interstate Commerce Commission has power to order the carrier to comply with a reasonable request to furnish oil tank cars.

1. The amendment of 1906 conferred upon the Commission power to make the order in question.

2. The amendment of 1910 serves to remove all doubt.

(a) Section 15 expressly empowers the Commission to issue orders prescribing any regulations or practices whatsoever in respect to transportation.

(b) The order in these cases deals with a regulation or practice under section 15, as amended.

(c) The order was within the jurisdiction of the Commission even if not strictly a practice.

3. The question whether the duty to provide and furnish cars is violated is administrative, and uniform control by the Commission is requisite.

4. Control by the Commission is imperatively required if the purpose of the act to prevent discrimination is to be effectuated.

5. The order involves the exercise of no new or unusual power by the Commission.

III. The order is not subject to the objection that it compels the use of cars beyond the line of the railroad.

IV. The order is not void because indefinite or uncertain.

V. The order does not require an unlawful interference with the rights of owners of private cars.

VI. The order afforded sufficient time for compliance.

ARGUMENT.

I.

The railroad is under a legal duty to furnish oil tank cars upon reasonable request.

1. The common law requires the common carrier to furnish reasonably adequate facilities for the transportation of the class of goods which it professes to carry.

“The first duty of the common carrier, who holds himself out to the public as ready to engage in the carrying business, is of course to provide himself with reasonable facilities and appliances for the transportation of such goods as he holds himself out as ready to undertake to carry. He must put himself in a

situation to be at least able to transport an amount of freight of the kind which he proposes to carry equal to that which may be ordinarily expected to seek transportation upon his route; for, while the law will sometimes excuse him for delay in the transportation, and even for a refusal to accept the goods which may be offered for carriage, when there occurs an unprecedented and unexpected press of business, it will not do so when his failure or refusal results from his not having provided himself with the means of present transportation for all who may apply in the regular and expected course of business." Hutchinson on Carriers, 3d ed., sec. 495. See Beale and Wyman, Railroad Rate Regulation, 2d ed., sec. 930.

In *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, in condemning a special yardage charge for the delivery of live stock in stock yards, the court said:

(p. 133) The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in respect to such matters is, whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public.

(p. 135) * * * The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered.

- (a) The obligation of the railroad is not simply to devote its specific property on hand to the public use, but to render adequate transportation service.

The vital question is, as said in the *Covington* case, *supra*, whether the facilities furnished "are sufficient for the reasonable accommodation of the public." It is true that at the early common law the coachman was excused for failure to carry if his coach was full. *Lovett v. Hobbs*, 2 Shower 127; *Riley v. Horne*, 5 Bing. 217. A railroad need not carry beyond its own line.¹ See *Michigan Central R. R. Co. v. Mich. R. R. Comm.*, 236 U. S. 615, 631. Also it may limit its undertaking to certain great classes; thus, it may carry passengers and refuse to accept freight. But, having undertaken to carry freight generally, it cannot refuse a particular commodity, such as, for example, oil. See *Wyman Public Service Corp.*, secs. 253, 260; also cases cited, *infra*, pp. 23, 24. In every case the law imposes upon the person who engages in a public service business the obligation to live up

¹ Similarly, a shipowner need not provide additional ships although his vessels are insufficient to carry all goods tendered. *Ocean Steamship Co. v. Savannah Supply Co.* 131 Ga. 831. But he must provide modern equipment on the ships furnished, for example, refrigeration facilities for shipment of meats. *The Southwark*, 191 U. S. 1, 9.

to the undertaking. And it is now well recognized that the undertaking of the modern railroad enforced by the courts in absence of statute is to serve reasonably the reasonable transportation needs of the community. As said in *Wyman on Public Service Corporations*, sec. 797:

In most of the public employments of the modern type what is undertaken is not merely the devoting of particular equipment to public use but rather the rendering of a certain service to the community with which it professes to deal. Thus a modern railroad plainly undertakes general transportation along its route; and since it has professed this general service it must see to it that it has sufficient equipment to handle the business which it has in effect invited by this general profession.

The duty to respond to increased demands such as are reasonably to be foreseen follows from the conceded duty of a carrier to carry, and to carry without discrimination. The obligation to carry would often prove vain, if sufficient excuse for failure were that the railroad had no cars available; and it would be easy to furnish such cars as were possessed to the favored shipper only. The necessities of the public in view of the railroad's usual monopoly are sufficient reason for the common law requirement. Competitors are not at hand to supply deficiencies. It is plain, moreover, that the obligation is not simply to furnish safe cars, as the appellee contended below. For the carriage of goods, the requirement is that cars be both safe and in sufficient number.

The general obligation of any public utility company is not to devote specific property to the use of the public but to furnish adequate service. Thus a water company has been compelled by mandamus to extend its water mains upon reasonable request. *Lukrawka v. Spring Valley Water Co.*, 169 Cal. 318, 329-332. See *Haugen v. Albina Light & Water Co.*, 21 Oreg. 411; *Columbus v. Mercantile Trust Co.*, 218 U. S. 645, 659. Similarly, a telegraph company must increase its telegraph lines (*Leavell v. Western Union Telegraph Co.*, 116 N. Car. 211, 221); and a telephone company its telephone service (*United States Telephone Co. v. Central Union Telephone Co.*, 202 Fed. 66) if the reasonable business necessities demand. In the telephone case the court said (p. 71):

* * * Every such charter contemplates that conditions will change from year to year and from decade to decade, and that the obligation of the company shall be to give that service, which, at the future time when the question arises, is then, and in view of the conditions then existing, reasonably adequate.

(b) Additional equipment must be provided if necessary to accommodate reasonable public demands.

The significance of the often recurring statement that the common carrier has excuse for failure to furnish cars by reason of unexpected press of business not reasonably to be foreseen, is that if the business could have been foreseen, and could reasonably have been provided for, the excuse does not avail. In many cases enforcing the common-law obligation this has been squarely held.

In *Yazoo and Miss. Valley R. R. Co. v. Blum Company*, 88 Miss. 180, a suit for failure to transport cotton, a plea of lack of adequate facilities was held bad on the ground that there was no averment of any effort to provide adequate equipment for properly handling a normal and expected crop. The court said, approving the language in 5 Am. and Eng. Encyc. (pp. 191, 192):

* * * But in the case of railroad and similar companies endowed with special and unusual powers, with the express view to their rendering to the public a freight and passenger service adequate to the needs of the country through which their lines pass, the law imposes the obligation to have and to furnish sufficient facilities for the reasonably prompt transportation of the goods tendered for carriage, and they are liable for a failure to transport promptly whether the failure is due to a want of facilities or to a captious refusal to carry.

In *Illinois Central R. R. Co. v. River and Coal Co.*, 150 Ky. 489, damages for failure to furnish an adequate number of coal cars were recovered. The railroad's supply of coal cars was held inadequate to meet "the demand [which] was not more than the company should reasonably have anticipated and prepared to meet at the season of the year when this controversy arose" (p. 493). The court said (p. 491):

* * * by failing to furnish an adequate number of cars for the transportation of coal, the railroad company has power to not only

injure or destroy the property of the mine owner, but to largely increase the price of coal to the consumer by failing to put on the market the amount of coal necessary to meet the demands of the trade.

At common law the carrier was bound to provide reasonable facilities and appliances to transport such goods as it held itself out ready to carry.

In *Branch v. Wilmington & c. R. R. Co.*, 77 N. Car. 347, the excuse for failure to transport promptly by reason of a great press of business in shipping through cotton was held unavailing, where it appeared that the increased business was to have been foreseen and cars could have been obtained. The court said (p. 350):

A common carrier (especially one having a monopoly of the carriage) who invites the public custom is bound to provide sufficient power and vehicles to carry all the goods which his invitation naturally brings to him.

In *Ocean Steamship Co. v. Savannah Supply Co.*, 131 Ga. 831, where a carrier was enjoined from providing unreasonably inadequate facilities for lumber while furnishing them for cotton, the court said (pp. 836, 837):

* * * he [the ship owner] is under no obligation to provide other ships because his vessel is inadequate to transport all goods which may be offered him. Such a carrier does not owe to the public all the duties imposed by the law on railroad companies and similar public institutions to furnish adequate transportation facilities for all goods which may be tendered.

Railroad companies are public institutions, and are granted certain exclusive franchises and rights which naturally impose correlative duties. * * * The conference of these unusual powers raises an obligation not only to serve the public impartially, but to serve the public efficiently. Upon them the law imposes the obligation to furnish sufficient facilities for the reasonably prompt transportation of goods tendered for carriage; and they are bound to provide sufficient cars for transporting, without unreasonable delay, the usual and ordinary quantity of freight offered to them, or which might reasonably and ordinarily be expected.

In *Cobb v. Illinois Central R. R. Co.*, 38 Iowa 601, damages were recovered for failure to carry grain. The court held that an instruction was properly refused which was to the effect that additional tracks and warehouses need not be provided to meet an unprecedented rush of business, saying (p. 623):

* * * It [a common carrier] is bound to do all that is reasonable, to use all reasonable means to accommodate its increased business.

In *People v. St. Louis &c. Railroad Company*, 176 Ill. 512, the court compelled new separate passenger train service to be furnished, holding that the common-law duty to provide adequate transportation was sufficiently specific to justify relief by mandamus.

- (c) Special facilities such as tank cars must be provided even though previously the railroad has not held itself out so to do.

From the obligation to render adequate transportation service in general it follows that the railroad must furnish special facilities if required by reasonable business demands. Although in the early cases the duty of the carrier to furnish stock cars for the transportation of cattle was denied, it is now universally recognized. *Kansas Pacific Ry. v. Nichols*, 9 Kans. 235; *R. R. Co. v. Pratt*, 22 Wall. 123; *Covington Stock-Yards Co. v. Keith*, *supra*. Similarly, as held in *Baker v. Boston & Maine R. R. Co.*, 74 N. H. 100, 110, special milk cars must be offered where—

large quantities of milk were produced by individual farmers living along the line of said defendant's railroad. The quantity was such that it was more economical and more advantageous to all parties—producers, distributors and consumers—to have it transported in special cars furnished with icing facilities than to have it carried in ordinary cars.

Coal cars must be furnished for the transportation of coal. *Lorraine v. Pittsburg &c. R. R. Co.*, 205 Pa. St. 132. The duty to furnish refrigerator cars has been enforced in suits for damages for failure to supply them. *Atlantic Coast Line R. R. Co. v. Geraty*, 166 Fed. 10; *Mathis v. Southern Ry.*, 65 S. Car. 271. In the *Mathis* case the railroad company failed to furnish refrigerator cars for the transportation of canteloupes, and the plaintiff shipper was compelled to ship by ex-

press. Recovery was allowed for the difference between the cost of shipment by express and by the refrigerator cars. Refiners of oil compelled to ship oil in barrels would seem to have similar remedy at common law.

The duty to furnish oil tank cars has been specifically recognized in *State v. Railway Co.*, 47 Ohio St. 130, a quo warranto proceeding in which a discriminatory rate against shipments of oil in barrels in favor of shipment of oil in private tank cars was condemned. The court said (p. 139, 140):

* * * It was the duty of the defendants to furnish suitable vehicles for transporting freight offered to them for that purpose, and to offer equal terms to all shippers. * * * The fact that one shipper may be provided with vehicles of his own, entitles him to no advantage over his competitor not so provided. The true rule is announced by the Interstate Commerce Commission, in the report of the case of *George Rice v. The Louisville & Nashville Railroad Company et al.* "The fact that the owner supplies the rolling stock when his oil is shipped in tanks, in our opinion, is entitled to little weight when rates are under consideration. It is properly the business of railroad companies to supply to their customers suitable vehicles of transportation * * * and then offer their use to everybody impartially." * * * Aside from this, however, a shipper is not bound to provide a car; the duty of providing suitable facilities for its customers rests upon the railroad company. * * *

In *Cincinnati &c. Ry. Co. v. Fairbanks & Co.*, 90 Fed. 467, judgment was directed for the plaintiff for the value of cottonseed oil lost by the railroad although there was no evidence of negligence. The oil was contained in tank cars furnished by a private company. The court (Lurton, Taft, and Clark, judges) held that liability as insurer was properly enforced, for the tank cars were furnished as within the obligation to furnish suitable and safe cars. If to furnish the cars had been a special service beyond the scope of the duty of a common carrier, a contrary judgment would have been rendered.

That oil tank cars are reasonably required for the accommodation of modern public necessities sufficiently appears in the cases at bar. Not only is 91 per cent of all the refined oil of the country transported in tank cars, but rail shipment in any other manner is prohibited by the expense (R. 20). Their use effects an economic gain. The oil industry has already adjusted itself to the movement of the product in bulk by refiners, jobbers and dealers. The industry in the United States is vast, in the neighborhood of one hundred companies being engaged in refining the 250,000,000 barrels of oil annually produced (R. 20). Many refineries are located along the line of the Pennsylvania Railroad, and the requirements of the complaining shippers alone are not inconsiderable (R. 21).

- (d) The railroad at bar, however, has held itself out specifically to carry oil in tank cars.

Whatever may be the common-law obligation to furnish special facilities under the general duty to furnish adequate facilities, however, it is altogether clear that the railroad must provide an adequate number of the kind of cars it specifically advertises and holds itself out to furnish. This limited proposition is sufficient to govern the cases at bar.

The cases are no different than if ordinary box cars were concerned. The fact must be taken as established by the finding of the Commission that the appellee railroad company has specifically held itself out to transport oil in bulk and in tank cars (R. 26).

It may be noted that the railroad in its answer to the complaint before the Commission alleged that in the schedules of rates filed for carrying articles in tank cars it stated that no obligation was assumed to furnish tank cars (R. 16). But the fact of such disclaimer does not appear from the record in the cases at bar. It is not alleged in the petition for injunction nor mentioned in the opinion of the District Court. The railroad evidently regarded it as immaterial, and pitched its case in the court on other considerations. Moreover, the obligation seems to be a matter of law, which follows as a necessary incident from the fact of the holding out and the public nature of the carrying business. The railroad may as well seek to avoid the obligation to furnish box cars by similar protest against the effect of its acts. See *Lloyd v. Haugh*, 223 Pa. St. 148, 154.

The Commission's finding of fact that the railroad has held itself out to carry oil in bulk and in tank cars is not reviewable. *United States v. L. & N. R. R. Co.*, 235 U.S. 314, 320. Indeed, no other finding would have been justified. The railroad published rates for the transportation of oil in tank cars. It has been the established custom of the railroad at bar and of railroads generally to transport oil in tank cars. The oil industry has developed in reliance thereon. This was found to be economically beneficial and even necessary. For 25 years the Pennsylvania Railroad has itself owned hundreds of tank cars, and has customarily transported oil in a vastly greater number of private oil tank cars (R. 20, 21). The significance of the vast amount of transportation by the railroad in tank cars owned by shippers and private car lines can not be minimized by the fact of such private ownership. The interposition of an independent contractor does not avoid the obligations incident to public service, and the cars must be treated as the carrier's own. See *Railroad Co. v. Geraty*, *supra*; *Interstate Com. Comm. v. Illinois Cent. R. R. Co.*, 215 U. S. 452; *B. & O. R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481; *State v. Railway Co.*, *supra*; *Cincinnati & c. Ry. Co. v. Fairbanks & Co.*, *supra*; *Covington Stock-Yards case*, *supra*; *St. Louis & c. R. R. Co. v. Renfro*, 82 Ark. 143; *Railroad Co. v. Dies*, 91 Tenn. 177; *Mathis v. Southern Ry.*, *supra*.

Having publicly held itself out to transport oil in bulk, and having customarily acted according to its

profession, the obligation follows under the common law to furnish tank cars upon reasonable request.

2. The duty is clearly imposed by the Hepburn Act of 1906.

The Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, provides in section 1:

* * * the term "transportation" shall include cars and all other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof * * *; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor * * *.

Whatever may be the carrier's duties at common law, by the statute responsibility is laid upon the railroad to provide and furnish cars, "irrespective of ownership or of any contract, express or implied, for the use thereof." The duty, moreover, is not simply to "furnish" such transportation, but "to provide"—"obtain so as to have ready or on hand when needed" (Standard Dictionary)—and also furnish. It is not enough simply to furnish such cars as happen to be on hand. All cars of whatever class are included—with the limitation that the request be reasonable.

Judge Thomson, dissenting in the court below, said (R. 57):

I cannot agree with the proposition that the duty imposed upon the carrier to furnish cars is limited to those which the carrier may

have on hand, or that there is no obligation to acquire facilities it does not possess, or to acquire better facilities to meet the reasonable demands of the shippers. I base my conclusion on words of the act itself, "it shall be the duty of every carrier subject to the provisions of this act, to provide and furnish such transportation on reasonable request therefor." No words more specific or definite than "provide and furnish" could have been chosen. I find no limitation of any kind in the act upon the duty thus imposed upon the carrier, except only that the request therefor be reasonable. There are no words from which it can fairly be assumed that existing ownership or control is a prerequisite to the carrier's duty to provide and furnish. From the explicit words of the act, it would seem to follow that if a reasonable request is made for cars and the carrier does not possess them, it must acquire them for use by one of the many methods for their acquisition. If not, this most important provision of the statute would be rendered largely nugatory.

(a) Recent decisions in this court recognize the obligation imposed.

The comprehensive character of the amendment was indicated in *Chicago &c. Ry. Co. v. Hardwick Elevator Co.*, 226 U. S. 426. A Minnesota statute requiring railroad companies to furnish cars for the interstate transportation of freight was held unconstitutional on the ground that the Hepburn Act was the exclusive measure of the carrier's obligation.

What kind of cars were in question does not appear. Mr. Chief Justice White, delivering the opinion of the court, said (p. 434):

The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is of course by these provisions clearly declared.

The case has been followed many times: *Yazoo &c. R. R. Co. v. Greenwood Grocery Co.*, 227 U. S. 1; *St. Louis &c. Ry. Co. v. Edwards*, 227 U. S. 265; *M. K. & T. Ry. Co. v. Harris*, 234 U. S. 412, 418; *Menasha Co. v. Chicago & Northern Ry.*, 241 U. S. 55, 58.

In *Ellis v. Interstate Com. Comm.*, 237 U. S. 434, involving an investigation by the Commission into private car lines operating refrigerator cars, the court said (p. 443):

The Armour Car Lines is a New Jersey corporation that owns, manufactures and maintains refrigerator, *tank* and box cars, and that lets these cars to the railroad or to shippers. * * * It is true that the definition of transportation in §1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth. The control of the Commission over private car lines, &c., is to be effected by its control over the railroads that are subject to the act. [*Italics ours.*]

The control of the Commission over the rates charged for the use of refrigerator cars is thus enforced. Since the Commission has control only over services rendered by common carriers, the railroads must have furnished the private refrigerator cars as common carriers. Hence the corresponding duties attach. There can be no distinction between refrigerator cars and oil tank cars, and none is claimed.

- (b) The evil to be remedied by the amendment of 1906 was in part the public injury due to insufficiency of the railroad's supply of tank and refrigerator cars.

The original Act to Regulate Commerce of February 4, 1887, c. 104, 24 Stat. 379, provided simply that—

The term "railroad" as used in this act shall include all bridges and ferries * * *; and the term "transportation" shall include all instrumentalities of shipment or carriage.

In *Scofield v. Lake Shore &c. Ry. Co.*, 2 I. C. C. 90 (1888), the Commission held that although there was a common-law obligation to furnish oil tank cars (p. 117), the act of 1887 neither imposed the obligation nor empowered the Commission to enforce it. In *re Transportation of Fruit*, 10 I. C. C. 360 (1904), a similar ruling was made with reference to refrigerator cars (p. 373).

Congress must be deemed to have had a purpose in mind in 1906 in specifically adding cars to the definition of transportation and in imposing the duty to furnish them.

The circumstances surrounding the enactment of the amendment demonstrate that it was specifically intended to cover tank and refrigerator cars. The Hepburn Act of 1906 was the culmination of a long popular agitation in favor of increased control over railroads, especially with reference to abuses of the so-called private car lines. In general, the railroads did not themselves own oil-tank and refrigerator cars, the principal kinds of private cars, but leased them from the private car lines. The message of the President recommending the passage of the amendments, the special message of the President transmitting the report of the Commissioner of the Bureau of Corporations dealing with abuses in connection with refrigerator cars and oil tank cars, the testimony of witnesses before the House and Senate committees, all brought the subject prominently to the attention of the legislative body. The evils were said to be not simply discriminations and rebates by use of allowances to private car owners, but also the power which the railroads had, by failing to provide adequate private-car facilities for some communities while furnishing them to others, to stifle the development of communities in disfavor and to ruin particular shippers to the unjust advantage of competitors. The special report of the Commissioner of Corporations, James R. Garfield, sharply called to the attention of Congress in a special message by the President on May 4, 1906, while debates on the bill in both Houses were in progress, pointed out specific instances of these evils. (Report of the Commissioner of Cor-

porations on the Transportation of Petroleum, 1906. House Doc. 812, 59th Cong., 1st sess.; see Sen. Doc. 428, *id.*; Cong. Rec., vol. 40, pt. 7, p. 6358.) One separate heading in the report was devoted to discriminations in the treatment of private tank cars (pp. 27, 464 *et seq.*). The report states:

(p. 33) The petroleum industry affords a striking example of the importance of the transportation problem.

(p. 34) * * * The present report, therefore, is concerned particularly with the relative advantages of different refiners in regard to transportation.

(p. 464) Besides the discriminations in rates on oil in California, another form of railroad discrimination practiced on the Pacific coast, and one far-reaching in its effect, occurs in the distribution of transportation facilities.

* * * Car shortage or unfair apportionment of tank cars is a complaint on the lips of nearly all independent producers, and it is a complaint that is amply corroborated.

Then follows a recital of instances of oppression, notably the withdrawal of the Union Tank Line cars (controlled by Standard Oil Co.) from the Southern Pacific and the refusal of that company to supply facilities in their stead.

The report continues (p. 466):

As a result of this condition, independent producers, generally speaking, had only these alternatives: First. To shut down their wells when unable to obtain cars from the railroads.

Second. To sell their output to one or two large purchasing companies which had cars or had power to obtain them from the railroads.

The testimony of a manager of the United Oil Producers said to be typical of the situation (p. 475-485) was reproduced. He stated that due to inability to obtain cars—

(p. 475) * * * The Southern Pacific and the Standard Oil Company ran us right out of business. The Standard Oil Company got the business that we lost.

(p. 486) A striking instance of the effect of car shortage upon the business of independent producers is afforded in the case of the King-Keystone Oil Company. * * *

“ * * * In consequence of inability to get cars the King-Keystone Company was forced to go out of business and turn over to the Standard Oil Company fifty-three live contracts. These contracts were assigned to the Standard Oil Company on May 20, 1903. They were with the best consumers in San Francisco, and our action was forced upon us.”

Similar experiences of the Monte Cristo Oil Company, Union Oil Company, Alma Junior Oil Company, East Puente Oil Company, the Dabney Oil Company (see p. 490) were narrated.

Complaints of inadequate car facilities were not confined to the western coast. The disastrous results to an agricultural community in North Carolina by reason of the failure of the railroads to furnish refrigerator cars were related to Congress by Con-

gressman Thomas, of North Carolina. He said (Cong. Rec., 59th Cong., 1st sess., vol. 40, pt. 2, p. 1958):

* * * there was such a failure on the part of the Armour car line to transport the strawberry crop of eastern North Carolina that the industry, amounting to about \$2,000,000 annually, met with apparently at the time almost irretrievable disaster. Immediately following my speech of last session, in which I insisted upon placing the refrigerator cars under the control of the commission, the strawberry growers of North Carolina were confronted not only by high refrigeration and freight rates, but with a car famine. Now, Mr. Chairman, the result was that along the line of the Wilmington and Weldon Railroad, in the strawberry belt, there was a loss of some \$750,000 to \$1,000,000. The strawberry growers not only depend upon reasonable rates of refrigeration, but depend upon the proper number of cars. Both must be combined. The loss was so great that many crates of strawberries were dumped in White Marsh, and crates were scattered for 2 miles along the side of the railway tracks.

(c) The history of the amendment of 1906 in the Halls of Congress shows that it was designed to meet this evil.

Many passages in the debates can be found which tend to prove that the act of 1906 not only covers the duty of the railroad to furnish tank cars, but also the power of the Commission to enforce that duty, a matter to be subsequently considered. The individual opinions of the members of the legislative

body are presented to the court not to show the proper construction of the act as passed, but simply the evil aimed at, and the environment at the time of enactment. The debates may be properly consulted for this purpose. *Tap Line Cases*, 234 U. S. 1, 27; *Seven Cases Eckman's Alternative v. United States*, 239 U. S. 510, 515.

Several methods of remedy were proposed in Congress. That adopted by the committee and enacted into law was the enlargement of section 1, so as to impose the duty to furnish tank and refrigerator cars upon the railroad, thereby subjecting it to direct control by the administrative body. Control over private cars would thus follow from control over the railroads. An amendment was offered proposing to abolish private car lines; but the occasional economic advantages of an independent car equipment company precluded the adoption of this suggestion. Another amendment would have made private car lines common carriers subject to the jurisdiction of the Commission. But it was explained in Congress that this would require the shipper and the Commission to deal with two agencies instead of the one railroad, and further, that because the matter was satisfactorily covered by the committee bill the amendment was unnecessary.

A bill to enlarge the powers of the Interstate Commerce Commission, called the Esch-Townsend bill, had been introduced in the 58th Congress and passed only in the House. This bill added nothing to the

definition of the term "transportation." Introducing the Hepburn bill, Mr. Townsend said (Cong. Rec., 59th Cong., 1st sess., vol. 40, pt. 2, pp. 1764, 1765):

* * * The measure which passed the House last session was believed to cover all the facilities of transportation, but inasmuch as some gentlemen contended that it did not, we have endeavored in the present bill to use such language as will take the matter out of the realm of doubt. To that end we have declared that cars, vehicles, and instrumentalities of shipment or carriage * * * shall be considered as being furnished by the carrier, and therefore under the supervision of the Interstate Commerce Commission.

Some of the most serious complaints have been those against these special services. Private car companies have been organized to do the people's work; * * *.

Mr. UNDERWOOD. I would like to know, the gentleman being a member of the committee, whether he can state to us he feels assured that the terms of this bill, if carried out, will control private cars?

Mr. TOWNSEND. I have no doubt about that at all. * * * I have always maintained that the power which gives the Commission control over interstate carriers gives it control over every agency of those carriers and over every car hauled by the carrier, whether owned by it or not; but this bill expressly names private cars.

Mr. Esch, speaking in support of the bill, said (*id.*, pt. 2, p. 2005):

* * * If there was nothing else in this bill than the provision giving a remedy against these private car lines I would most earnestly support it. * * *

This bill will permit the Commission to grant speedy relief to shippers who allege that they have been unjustly discriminated against in withholding facilities of shipment, such as spur-track connections, car allotments, etc., for we give the Commission in this bill the power to determine and order "what regulation or practice in respect to transportation is just, fair, and reasonable".

Mr. Stevens of Minnesota said (*id.*, pt. 3, p. 2081):

Now, this measure, in brief, contains five affirmative provisions.

* * * * *

Third. Extending the affirmative power and scope of the Commission over such subjects as private cars and refrigeration, etc.

Mr. Davidson said (*id.*, p. 2103, 2104):

One of the important features of this proposed legislation is that which defines the word "railroad" and the word "transportation" in a manner to include all these auxiliary companies and all the instrumentalities of a common carrier.

Enact this measure and all the practices and regulations of these auxiliary companies, as well as those of the carriers themselves, will be subject to regulation and control by the Commission.

* * * The people will not longer submit to a system of control of the public highways of the country which leaves private shippers certain of nothing, but that they are not treated on the same terms as their neighbors, which bankrupts small shippers and enormously increases the wealth of the larger ones, which destroys some communities that it may create others.

Mr. Webber said (*id.*, p. 2109):

* * * I never could figure out how any private car company has a right as against the public to send its cars over these tracks by contract with the railroad companies.

* * * The gentleman from Maine said, in substance, if he had his way he would do away with the Interstate Commerce Commission. I was startled by the statement he made—that the wronged shipper should resort to common law for redress. I will admit that a wronged shipper has at common law a remedy so far as the law itself is concerned, but the difficulty is in working it out. It may be fine in theory, but impracticable in practice, and it was because of that fact that this Interstate Commerce Commission was organized.

Mr. Dickson, submitting the report of Mr. Pickering, in connection with an investigation of the Illinois Railroad and Warehouse Commission, and referring to the evils of the private car system, said (*id.*, p. 2155):

* * * If the common carrier authorized by law to transport commodities is short of

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equipment, it should be compelled to purchase sufficient cars to handle the traffic that is offered.

Mr. Wiley, of Alabama, said (*id.*, p. 2241):

The bill now under consideration does embrace within its provisions, and seeks to regulate them, the private-car and side-track evils, and in that respect, if in none other, it is a far better measure, more remedial and beneficial, than the Esch-Townsend bill, which passed the House twelve months ago, just in time to receive its deathblow in the Senate.

During the debate in the Committee of the Whole in the House Mr. Thomas, of North Carolina, offered an amendment which would add the words after the definition of "transportation" (*id.*, p. 2260):

and to furnish the number of cars necessary for such transportation without delay.

He said:

* * * if this amendment is not necessary I do not want it to pass. * * * I want * * * them to furnish the proper number of cars. And if the term "transportation," as used in the bill, covers the proper number of cars, why, all well and good. We had, during the last strawberry season, in my section of the country a car famine, and I want to provide against that. If this bill covers it, why, all right.

The provisions of the bill so clearly covered the situation that the amendment was rejected.

A similar course was followed in the Senate. Senator McCumber, objecting to the definition of "transportation" in section 1, and desiring to put the provisions covering private cars beyond all doubt, offered an amendment to section 1 specifically providing (Cong. Rec., 59th Cong., 1st sess., vol. 40, pt. 7, pp. 6374-6375):

That all refrigerator cars, cold-storage cars, or other freight cars, whether owned by any common carrier or by any other person or corporation, used in interstate commerce, shall be covered by the provisions of this act; * * *

In discussing this proposed amendment Senator Bailey said (*id.*, p. 6376):

This bill recognizes, as I believe it ought to do, that a condition has grown up in which certain individuals or corporations have been supplying the facilities which the railroad itself ought to supply. This bill does not interfere with that. This bill still permits, as I read it, any man engaged in any business to load his own cars, ice them in his own way, and tender them to the railroad for carriage; and when the cars are so tendered, the railroad carries them, its only charge being for the naked act of transportation. But, for my part, I rejoice that the Congress in this bill has recognized the duty and has sought to enforce upon the carrier the duty of properly equipping itself for the public service. It seems to have been overlooked that the very

last part of the sentence under consideration provides:

"And it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

That is simply giving the Commission a jurisdiction to enforce the obligation of the carrier as it exists at the common law.

The amendment submitted by Mr. McCumber was rejected.

An amendment by Mr. Kittredge was then proposed, making the private car lines common carriers within the meaning of the act (*id.*, p. 6376); but was rejected. Mr. Clapp, discussing Mr. Kittredge's amendment, pointed out the cogent reasons for rejection, saying (*id.*, p. 6438):

* * * I fully agree with him, as every one else must agree with him, as to the evil known as the private car lines. As he wisely suggested in his remarks last Friday, one of the remedies is the elimination of the private car lines. The committee at its hearings last spring and the members of the committee in considering this subject have been face to face with the proposition whether private car lines could be eliminated. We recognize it is the law that a common carrier must furnish the facilities for transportation; we realize that they depend to-day very largely upon the private car lines for those facilities; and now to abruptly require them to make the necessary investment and to

create that disturbance which would result from the prohibition of the use of these cars by anything but a railroad company seemed entirely too drastic, and the committee had to abandon that thought.

The next plan was how best to meet the evil of the private car lines. One difficulty to-day is that the shipper of fruit and other freight requiring refrigeration has to deal not only with the railroad company which transports that freight, but also he has to deal with the company owning these private cars; and while it did not seem a bit feasible, if advisable, to eliminate the private cars, it did seem as though we ought to take one step forward and *require the common carrier to furnish these cars so far as the shipping public is concerned*, so that the shipper would have to deal only with one corporation, and that would be the carrier, and the carrier would be free either to buy its cars, own its cars, rent its cars, or employ the cars owned by the private car line companies so long as in its last analysis the cost of transportation, including refrigeration and those things especially inherent in the private cars, was within the control of the Interstate Commerce Commission and the shipper had to deal only with one person, and the Commission had to deal only with one person, and that the common carrier. So we provided first as to what a carrier—a railroad—should be, what transportation should be, bringing refrigeration, icing, and all these matters finally under the one head of transportation or freight, so that it would simplify the subject both with the shipper and the Commission. [Italics ours.]

On May 7, in answer to a question from Senator Lodge, Senator Knox, discussing the amendment offered by Mr. Kittredge, said that in his judgment the amendment was unnecessary. He said (*id.*, p. 6440):

If you will take the bill as the Senator from South Carolina called attention to it a moment ago, you will find that under the definition of transportation that is all provided for. Assuming that they are not carriers and assuming that they are not now within the jurisdiction of the interstate commerce act, what are they? They are facilities and instrumentalities of commerce. That is what they are as a fact, and that, of course, no one can question. They are facilities and instrumentalities of commerce—they are cars. The pending bill says that all instrumentalities and all facilities of every kind used or necessary in the transportation of persons or property shall be within the meaning of this act, and then, in order "to make assurance doubly sure," they bring it in under the title of "transportation," and say that "transportation shall include cars and other vehicles." I therefore think it is wholly unnecessary to adopt the amendment of the Senator from South Dakota.

* * * * *

Mr. LODGE. Mr. President, I have received the answer I desired to receive—that the amendment is unnecessary.

The VICE PRESIDENT. The question is on agreeing to the amendment of the Senator from South Dakota (Mr. Kittredge).

The amendment was rejected.

Senator McCumber, evidently not satisfied with the action of the Senate on the amendments offered previously by him and Senator Kittredge, on May 9 presented a similar amendment, as follows (*id.*, p. 6570):

That on and after January 1, 1909, every railroad company doing an interstate commerce business shall furnish all freight cars, whether refrigerator, cold-storage, or other specially constructed or designed cars for the carriage of special merchandise, necessary for the conduct of its business as a common carrier. * * *

But for reasons obviously similar to those which had previously governed, this amendment also was rejected.

(d) The violation of legal duty in these cases is established.

It seems clear that the District Court was in error in holding that the "practice of the carrier found unlawful in this case was not in violation of the statute" (R. 53).

The reasoning of the court that the term "instrumentalities" in the act of 1887 included cars, hence the addition of the term "cars" in the amendment of 1906 did not enlarge the scope of the carrier's obligations, overlooks the evil sought to be remedied by the amendment, and overlooks the further addition in the amendment of the terms imposing the duty to furnish cars and other instrumentalities.

The court did not hold that if the statutory duty was imposed it was not violated. The findings of

the Commission that "defendant's equipment did not meet the reasonable demands of complainants" (R. 22), and that "the tank cars furnished by defendant plus complainant's privately owned cars have" (R. 23) at times been insufficient, were not challenged before the District Court nor criticised by it. Ample evidence is cited in the report in support. (R. 22, 23.) The finding is not open to attack. *Pennsylvania Co. v. United States*, 236 U. S. 351, 361; *United States v. L. & N. R. R. Co.*, 235 U. S. 314, 320; *Interstate Com. Comm. v. Illinois Central R. R. Co.*, 215 U. S. 452, 470.

The legal obligation to furnish oil tank cars and its violation in these cases must be taken as established. There remains only the question whether the acknowledged duty is one enforceable by the Commission, or solely by suit in the courts.

II.

The Interstate Commerce Commission has power to order the carrier to comply with a reasonable request to furnish oil tank cars.

The pertinent provisions of the Act to Regulate Commerce as amended are quoted *supra*, pp. 3-6. The original act of February 4, 1887, c. 104, 24 Stat. 379, did not impose on the carrier the duty to furnish cars or transportation, and contained no provisions empowering the Commission to make effective orders. The duty was imposed and the

power conferred by the amendments of March 2, 1889, c. 382, 25 Stat. 855, 858, June 29, 1906, c. 3591, 34 Stat. 584, 589, and June 18, 1910, c. 309, 36 Stat. 539, 551.

1. The amendment of 1906 conferred upon the Commission power to make the order in question.

In support of the Commission's power, the Government relies particularly upon sections 1, 12, and 15, as amended.

Section 12 imposes upon the Commission the authority and duty "to execute and enforce the provisions of this act." Act of March 2, 1889, c. 382, 25 Stat. 858. One of the provisions which it is thus made the duty of the Commission to enforce is section 1, requiring railroads to furnish cars.

At this point reference is made only to the power conferred by section 12, which was in existence in 1906, when section 1 was amended. Section 15, which confers power upon the Commission to prescribe regulations and practices, was further amended in 1910, and the enlarged powers thereby accruing will be subsequently considered.

The very purpose of imposing upon the carrier in 1906 the duty to furnish cars was to give the Commission jurisdiction to enforce that duty. This would seem clearly to be the plan of the legislators from a simple reading of the statute. See also the passages in the debates, *supra*, pp. 37-43.

It is settled that a governing principle in the construction of the Commission's powers under the

amendment of 1906 is its recognized purpose to grant speedy and efficacious remedies for the enforcement of the duties imposed. *Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 498, 499. Applying this principle, it seems obvious that remedy for violation of the duty to furnish cars is not to be found in the comparatively slow and cumbersome processes of the courts; but, on the contrary, in the administrative commission established for that purpose.

2. The amendment of 1910 serves to remove all doubt.

- (a) **Section 15 expressly empowers the Commission to issue orders prescribing any regulations or practices whatsoever in respect to transportation.**

It is not necessary to rest the argument in support of the Commission's jurisdiction solely upon section 12. The order in question deals with a regulation or practice of the railroad in furnishing the facilities of transportation, and section 15 in explicit terms authorizes the Commission by order to prescribe regulations or practices of that character.

Section 15 as amended in the act of 1906 was as follows (34 Stat. 589):

That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this act, for the

transportation of persons or property as defined in the first section of this act, or that any regulations or practices whatsoever of such carrier or carriers *affecting such rates*, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. * * * [Italics ours.]

In 1910 the italicized words "affecting such rates" were stricken out. The provision in full as amended on June 18, 1910, 36 Stat. 551, is quoted *supra*, pp. 5, 6.

After it had been held that the Commission as created by the act of 1887 had no power to fix rates, it became recognized that its hands would have to be strengthened in this regard. The devices of rebating, as one method of discrimination in rates, were more effectually prevented by the Elkins Act

of 1903. The power to prescribe future reasonable and nondiscriminatory rates was added by the amendment of 1906. Problems of rates and discriminations, and the principles governing their solution, thus were soon largely settled. But thereafter it became clear that provisions for reasonable and nondiscriminatory rates were not enough. It is often more highly important to the shipper to secure adequate service than to have reasonable rates. His business can not be carried on at all in some instances if transportation facilities are not adequately furnished, whereas unreasonably high rates are often merely a matter of increased expense. Where, as with the California oil producers and the North Carolina strawberry growers (*supra*, pp. 33-35), whole industries are handicapped by lack of car facilities, not only is the shipper injuriously affected but the consuming public is compelled to pay higher prices.¹

The consciousness of the necessity of increased control over service and facilities became a settled conviction in the legislative mind in 1910. The Commission undoubtedly had power to deal with some

¹The importance of the subject in the public mind is indicated by the fact that in practically all States there are penalty statutes compelling the prompt furnishing of cars. See *Chicago &c. Ry. v. Hardwick Elevator Co.*, 226 U. S. 426; *Illinois Central R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275; *St. Louis &c. Ry. Co. v. Arkansas*, 217 U. S. 136; *Southern Ry. Co. v. Moore*, 133 Ga. 806, 26 L. R. A. (N. S.) 851; *Patterson v. Missouri Pacific Ry. Co.*, 77 Kans. 236, 15 L. R. A. (N. S.) 733; *Houston & Texas Central R. R. Co. v. Mayes*, 201 U. S. 321.

regulations and practices of the carrier, even though not affecting rates directly, under the act of 1906. See *Interstate Com. Comm. v. Illinois Central R. R. Co.*, 215 U. S. 452, 475, 476, 477 (1910). But the extent of the power already conferred was not thoroughly appreciated, and it was deemed so important to secure effective provisions for adequate service that in the amendment of 1910 it was proposed to make the legislative declaration of the duties to render reasonable service all-embracing, and to put beyond reasonable question the power of the Commission to compel such service.

The report of the Committee on Interstate and Foreign Commerce which on April 1, 1910, recommended the bill to amend the Interstate Commerce Act (H. R. 17536, House Report No. 923, 61st Cong., 2d sess.), stated (p. 10):

Section 9 proposes to amend section 15 of the act to regulate commerce. Section 15 of the act to regulate commerce is the section under which orders of the Commission in regard to rates are now made. Under the provisions of section 15, as it now stands, the authority of the Commission to enter an order is confined to the subject-matter of rates for transportation and regulations or practices "affecting such rates" and the establishment of through routes where "no reasonable or satisfactory through route exists". As recommended to be amended by your committee, section 15 of the present law will have its scope largely increased, and the jurisdiction of the Commission will be much enlarged.

Under the section as reported, the Commission is given jurisdiction to enter orders not only in regard to rates, but also in regard to classifications, regulations, or practices, whether they affect rates or not, and to determine what are proper classifications, regulations, and practices, in addition to rates, and to require the carriers not only to follow the rate which may be fixed by the order of the Commission, but also to adopt the classification and conform to and establish, observe, and enforce the regulation or practice prescribed by the Commission, and this provision should be read in connection with the amendment recommended by your committee to sections 1 and 13 of the existing interstate commerce act.

The amendment to section 1 referred to was enacted in the statute substantially as recommended. H. Rept. No. 923, *supra*, p. 25, act of June 18, 1910, 36 Stat. 546, sec. 1.

Mr. Mann, in introducing the bill in the House, said (Cong. Rec., 61st Cong., 2d sess., vol. 45, pt. 5, p. 4571):

* * * It is their [the railroad's] due that they be treated with fairness and reasonable consideration by Government and by the people, and it is our duty to see that they shall treat fairly all those who deal with them, and that they shall furnish with reasonable diligence those advantages of convenient and economical transportation for which they are constructed and operated under favors granted by the States.

(p. 4572) Broadly speaking, the propositions involved in the pending bill may mostly be covered under three general heads:

First. To expedite justice through speedy determination of disputes by means of the creation of the commerce court and other methods provided in the bill.

Second. Enlarging the statutory duties of the railways and the rights of shippers and increasing the powers of the Interstate Commerce Commission; so that classifications, regulations, and practices shall be just and reasonable and enforceable as such, whether affecting the rates charged or not.

Third. Regulating the consolidation of railroads and the stocks and bonds which may be issued, etc.

(p. 4573) We have conferred upon the Interstate Commerce Commission the broadest kind of powers now so far as railway rates are concerned, and we are proposing in this bill to greatly enlarge their power by giving them the same power over classifications, regulations, and practices which they now have over rates.

An amendment was offered designed to give the Commission the power to prescribe and establish rules and requirements to control the acts, charges and practices and enforce the duties and obligations of all common carriers, but it was rejected after Mr. Mann, in charge of the bill, had explained that the matter was fully covered. Mr. Mann said (pt. 6, *id.*, p. 5852):

Mr. Chairman, so far as I could learn from the reading of the amendment, everything in it

is now covered in the bill. * * * Section 6a of the bill, amending section 1, makes it the duty of common carriers to establish just classifications, regulations and practices in reference to a number of things that are enumerated in the bill, and practically covering everything in connection with the receipt, handling, transporting, storage, and delivery of property subject to the provisions of the act which may be necessary or convenient to secure the safe and prompt receipt, handling, transportation, and delivery of property upon just and reasonable terms; and every unjust and unreasonable classification and practice is prohibited and declared to be unlawful. That is all in section 1. It imposes that duty on railway carriers and section 13 of the act provides that if this is not done complaint can be filed before the commission, or the commission, on its own initiative, may make the investigation. Section 15 of the act to regulate commerce, which is section 9 of this bill now under consideration, gives to the commission, if the railway company does not establish these just and reasonable regulations, practices, classifications, and rates, the power to establish them, and require the railway company to enforce and observe them.

The conference report recommended the passage of the provisions mentioned. Conference Report No. 1588 on House bill 17536, Sen. Doc. No. 623; see Cong. Rec., vol. 45, pt. 8, p. 8134 *et seq.* The statement of the managers on the part of the House in the

conference committee included this language (p. 8141):

and retains the important provision requiring common carriers to establish, observe, and enforce just and reasonable classifications of property for transportation, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, etc. * * *

That the power conferred upon the Commission was intended to be most comprehensive is shown by the terms of section 15. The words are "*any individual or joint classifications, regulations, or practices whatsoever.*" A regulation is a written rule governing a method of doing business. A practice clearly is not limited to such methods as have become habits. It includes any manner of performing the duties imposed by the act.

Consideration of the amendment to section 1 in the act of 1910 also shows the all-embracing character of the practices over which the control of the Commission was extended. Section 1, as appears from the committee report recommending the legislation of 1910, is to be read in connection with section 15. The paragraph added to section 1 (paragraph 4 of the act now in force) is as follows (36 Stat. 546, c. 309, June 18, 1910):

And it is hereby made the duty of all common carriers subject to the provisions of this

Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful.

Many matters included within the meaning of facilities of transportation are enumerated. The duty to observe just and reasonable regulations and practices affecting—

classifications,
the issuance, form, and substance of tickets,
receipts, and bills of lading,

the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage,

are all specifically mentioned. But these are given only as examples of the wide character of the regulations and practices intended to be covered. For the paragraph goes on to prescribe the duty of the carrier to make reasonable regulations and practices affecting "the facilities for transportation," and "all other matters relating to or connected with the receiving, handling, transporting, storing, and delivering of property." The regulations and practices are to be such as may be necessary or even proper to secure the safe and the prompt receipt, handling, transporting and delivery. In making the paragraph all-comprehensive, it was necessary to include many of the matters already covered in the amendment of 1906 in paragraph 2 of section 1. For instance, in both, the duty to carry upon just and reasonable terms is specifically mentioned. In both, facilities of transportation are particularly named. Under paragraph 2, the carrier has the duty to furnish facilities of shipment. Paragraph 4 provides that the carrier must establish and observe just and reasonable regulations and practices affecting facilities for transportation. Similarly, in paragraph 2, the duty is imposed to provide and furnish upon reasonable request all service in connection with the receipt, delivery and transfer in transit of property transported. In section 4 the duty is imposed

to establish just and reasonable regulations and practices affecting the receiving, handling, transporting, and delivery of property. Some repetition was deemed necessary, because the words of the second paragraph had been the subject of judicial construction, and it was not desired to disturb their settled meaning.

The consistent plan is clear. Paragraph 2 imposes the duty to furnish adequate service. Paragraph 4 provides that as to the particular manner of performing the duty, the carrier must establish and observe just and reasonable regulations and practices. And if those established by the carrier are not reasonable, section 15 gives the Commission power to prescribe reasonable regulations and practices, which are to be in the future observed.

(b) The order in these cases deals with a regulation or practice under section 15 as amended.

The railroad company, in denying the request of the Pennsylvania Paraffine Works to send tank cars sufficient to ship 450,000 gallons of oil per month, laid down its rule in a letter as follows:

We beg to say that the railroad company is not prepared to increase its present tank car equipment. (R. 21.)

This was a rule to be followed in the future. The subject matter was the manner of complying with the duty to furnish a facility of transportation. It was in writing, and might well be termed a regulation within the meaning of the statute.

The Commission found that it was a practice and that it was unlawful. The order required the railroad in the future to observe a method of dealing with the receipt, transporting, and delivery of oil in bulk by means of tank cars, *i. e.*, a practice affecting such receipt and transporting.

Whether a particular manner of doing business constitutes a practice is a question of fact which, in case of dispute, is for the Commission to determine. If there is any evidence upon which the determination of the Commission may rest, the Commission's decision is final. *Interstate Com. Comm. v. Illinois Central R. R. Co.*, 215 U. S. 452, 470; *Balto. & Ohio R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 494; *United States v. Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320. It can not be said that the finding of the Commission in these cases that a practice was involved (R. 28) is utterly unsupported by the evidence.

All of the members of the District Court agreed that the order dealt with a practice. The majority held simply that the practice was not unlawful. Judge Woolley, speaking for himself and District Judge Orr, said (R. 53):

* * * the practice of the carrier found unlawful in this case was not in violation of the statute, and the order of the commission directing the carrier to desist from that practice was an exercise of power not conferred by law.

In *Atchison Railway Co. v. United States*, 232 U. S. 199, the railroad company refused to extend the privi-

lege of precooling shipments of citrus fruits in refrigerator cars and cancelled its tariffs. The Commission held the refusal unlawful and entered an order requiring the roads to permit precooled shipments at the rate fixed (p. 204). This court upheld the order of the Commission as an order affecting a practice (p. 218). In the *Atchison* case the railroad company refused to furnish adequate car service for transporting fruit. In the cases at bar the railroad company has refused to render adequate car service for transporting oil. Both involve practices.

In *Loomis v. Lehigh Valley R. R. Co.*, 240 U. S. 43, damages were sought for failure to supply adequate cars for shipment in bulk of wheat, oats, rye, apples, cabbages and potatoes. Ordinary box and refrigerator cars are inadequate for this service until equipped with inside doors and bulkheads. These practices affecting the furnishing of cars were held to be within the control of the Commission. This court said (p. 50):

* * * Ample authority has been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted.

Similarly, whether linings in cars for potato shipments in winter, or special heated cars shall be furnished (see *N. Y. Shippers' Association v. N. Y. Central & c. R. R. Co.*, 30 I. C. C. 437), whether shipments

of potatoes may be refused in winter altogether (see *Protection of Potato Shipments in Winter*, 26 I. C. C. 681, 685), whether flat cars for carriage of lumber should be equipped with stakes (see *Nat. Lumber Dealers' Ass'n v. Atlantic Coast Line R. R. Co.*, 14 I. C. C. 154), or cars padded in which flour in sacks is carried (see *Millers' Club v. R. R. Co.*, 26 I. C. C. 245), or grain cars equipped with outside grain doors for shipment in bulk (see *Farmers Co-op. Ass'n v. R. R. Co.*, 34 I. C. C. 60), are questions involving practices or regulations affecting transportation within the control of the Commission. Similarly the conduct of a railroad with respect to station restaurants (see *Montgomery v. C. B. & Q. R. R. Co.*, 228 Fed. 616), and storage in transit privileges (see *Newmark Grain Co. v. Southern Pacific Co.*, 30 I. C. C. 431), is within the control of the Commission.

(c) The order was within the jurisdiction of the Commission even if not strictly a practice.

The powers of the Commission to issue orders under sections of the act other than section 15 have already been considered in connection with the amendment of 1906, *supra*, pp. 47, 48. Section 12 is relied upon and is still in force. Moreover, the concluding paragraph of section 15 that the enumeration of powers in section 15 "shall not exclude any power which the commission would otherwise have in the making of an order under the provisions of this Act," was continued in the act of 1910, c. 309, 36 Stat. 551. It demonstrates that the enumeration of the powers

in section 15 was in extension rather than in limitation of those otherwise conferred.

In all of the cases in this court involving the amendments of 1906 and 1910 there has been no disposition to whittle away the broad powers granted. Thus, although the order in the *Pipe Line Cases*, 234 U. S. 548, requiring pipe lines to file tariff schedules, did not strictly speaking involve a practice, it was sustained.

Considerations based upon the policy of the entire act require that the Commission's order in the instant cases be sustained. This is necessary, it is submitted, in order to effectuate the broad underlying purposes of the amendments to submit administrative questions to an expert tribunal; to secure uniformity in administration; to prevent discrimination with respect to rates and car facilities howsoever attempted; and to provide for effective enforcement by administrative rather than judicial orders.

3. The question whether the duty to provide and furnish cars is violated is administrative, and uniform control by the Commission is requisite.

It is settled that a prime object of the amended act was to confide to the Commission for determination all administrative questions. As was said in the *Minnesota Rate Cases*, 230 U. S. 352, 419, 420:

* * * The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose;

and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the preliminary action of the Commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it.

The administrative character of the question as to the adequacy of the supply of cars appears from the host of complicated facts upon which its solution must often depend. The duty is not absolute but relative. As was said by this court in dealing with a State regulation requiring an interstate train to make local stops in *Atlantic Coast Line R. R. Co., v. Wharton*, 207 U. S. 328, 335:

The term "adequate or reasonable facilities" is not in its nature capable of exact definition. It is a relative expression, and has to be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodations asked for, and to all other facts which would have a bearing upon the question of convenience and cost.

An illustration of the administrative character of the questions involved is given in the cases at bar. In alleging a violation of duty the shippers complained of the railroad's methods of settlement of damage to their private cars, of delays in delivery and return of empties, and of failure to report the

location of cars (R. 22). The railroad claimed that though there had been delay, an adequate car service had been furnished to meet the shippers' demands (R. 22, 23). The figures of car demands at various dates and cars furnished seem complicated. In its opinion the Commission dealt with the varied character of the 44 liquid commodities transported in tank cars, and recognized that for some, by reason of the technical knowledge required in preparation for shipment, the small amount of the demand or the dangerous nature of the handling, it would not be reasonable to require the railroads to furnish tank cars (R. 32). As to these shipments, which were held to be in a different class from shipments of petroleum, a rule was laid down that the common carriers

should publish rates for the transportation of the privately owned tank car filled with these products and not, as in the case of oil, for the transportation of the product in tank cars (R. 32).

There was imported into the proceeding before the Commission the bearing of the shippers' past supply of private tank cars (R. 23), of the obligations of other railroads to supply like equipment (R. 32), and the extent of capital outlay required (R. 31, 33). All the manifold considerations which determine the reasonableness of the demand for cars show that the expert Commission properly has jurisdiction.

The purely administrative character of the question in many cases is apparent. While in such cases the

courts would have no jurisdiction in the first instance, the violation of the carrier's duty may be so plain in a particular case that suit for damages may be brought in the courts without prior administrative determination. A carrier's capricious or wholly unjustified refusal to furnish cars to a particular shipper can be compensated directly by the courts. See *Louisville & Nashville R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70. An illustration is furnished in *Eastern Ry. Co. v. Littlefield*, 237 U. S. 140, where the carrier was requested in May to furnish cars for October shipments. It not only offered no valid excuse but did not even notify the shipper of its inability to furnish cars at the time the shipments were tendered in October.

It is well settled that the procedure in the analogous cases of discrimination is governed by similar principles. *Morrisdale Coal Co. v. Pennsylvania R. R. Co.*, 230 U. S. 304; *Pennsylvania R. R. Co. v. Clark Coal Co.*, 238 U. S. 456; *Pennsylvania R. R. Co. v. Puritan Coal Co.*, 237 U. S. 121. In *Illinois Central R. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, damages for failure to furnish coal cars were recovered. The carrier's rule for the distribution of cars was not attacked. The court instructed the jury that if the common carrier had fairly distributed its available cars it would not be liable. The jury found for the plaintiff. Hence the carrier had violated its own rule of distribution (pp. 278, 283) and it was held there was no administrative question demanding prior determination by the Commission.

If, on the other hand, as in the *Morrisdale Coal Company* case, *supra*, the violation of the carrier's duty is not plain from any aspect, but administrative questions of fact are involved, the Commission has exclusive jurisdiction in the first instance.

From these decisions it is apparent that many cases involving questions of adequacy of car facilities must first proceed exclusively before the Commission. Clearly the question may properly be first submitted to the Commission in all cases. The complaining shipper in a case involving a plain breach of duty would have his election to go to the Commission. Thus, in *Pennsylvania R. R. Co. v. Clark Coal Co.*, 238 U. S. 456, 471, 472, where damages for inadequate and discriminatory car service were sought in the courts independently of proceedings before the Commission, the claim being that the carrier had violated its own rule of distribution, it was held that it had not only been proper for the shipper to proceed before the Commission, but that, having done so prior to the institution of suit, he was bound by his election.

From further considerations does the necessity for one centralized administrative control appear. Control over car equipment seems to follow as a necessary incident from the established power over through routes. The Commission has authority to require interchange of cars in connection with through routes. *Missouri & Illinois Coal Co. v. Illinois Central R. R. Co.*, 22 I. C. C. 39; *Pittsburg & S. W. Coal Co. v. Ry. Co.*, 31 I. C. C. 660, 663; sec. 1, par. 2,

and sec. 15 of the act as amended June 18, 1910, c. 309, 36 Stat. 539, 545, 551; sec. 7, act of February 4, 1887, c. 104, 24 Stat. 382. If in an established through route one carrier has an insufficient number of cars, in all fairness to the connecting carrier the Commission should have power to compel the delinquent to provide its proper quota.

In *United States ex rel. Stony Fork Coal Co. v. Louisville & Nashville R. R. Co.*, 195 Fed. 88, mandamus was awarded to compel the transportation of coal on an established through route, but questions as to the number of cars to be furnished by each connecting carrier were held to be within the jurisdiction of the Commission (p. 94). In the *Missouri & Illinois Coal Co.* case, *supra*, the railroad's excuse for failure to furnish cars for transportation beyond its own lines, that other railroads unlawfully withheld the return of cars, was held insufficient. In *St. Louis & c. Ry. Co. v. Arkansas*, 217 U. S. 136, suit was brought for failure to furnish cars as required under local statutory authority. The state court allowed recovery, holding that the cause of the railroad's failure was inability to regain cars on other lines, which in turn was due to the insufficiency of the rules of the American Railway Association regulating the interchange of cars. This court reversed the judgment, and said that if it be conceded that the rules of the American Railway Association were inefficient (p. 150):

* * * In the nature of things, as the rules and regulations of the association con-

cern matters of interstate commerce inherently within Federal control, the power to determine their sufficiency we think was primarily vested in the body upon whom Congress has conferred authority in that regard.

These cases demonstrate the intimate connection between questions of through routes and car equipment.

From still another viewpoint, namely the inseparable connection between matters of car equipment and of rates, is the necessity for common Commission control shown. In *Loomis v. Lehigh Valley R. R. Co.*, 240 U. S. 43, shippers brought suit in a state court for the expense of furnishing lumber to fix box cars for the transportation of wheat, oats, apples and potatoes, etc., "upon the theory that the carrier having failed to perform its common-law duty to furnish adequate cars, they were entitled to recover as damages their consequent outlay." It was held in the Court of Appeals of New York "that the common law imposed upon the railroads the duty of furnishing cars equipped with inside doors, or bulkheads for transporting grain or provisions in bulk" (p. 48). But the jurisdiction of the courts to afford relief was denied on the ground that the question was administrative, saying (p. 50):

* * * And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court.

If in the instant cases the complaining shippers had been compelled to ship oil in barrels instead of tank cars, and had sued to recover excess transportation charges occasioned thereby (see *Mathis v. Southern Ry. Co.*, *supra*), a ruling similar to that in the *Loomis* case would have followed. The complainants would have been referred to the Commission, which has "ample authority * * * to administer proper relief, and in connection therewith to approve some general rule of action" (240 U. S. 50).

In *Texas & Pacific Ry. Co. v. American Tie Co.*, 234 U. S. 138, suit was brought in a State court for failure to furnish cars for the transportation of oak crossties. It appeared that the railroad company had filed no tariff particularly relating to oak crossties, and had reasonable excuse therefor because there had been no prior demand for such transportation. The shipper claimed that the tariff on lumber generally was applicable. This court held that no recovery for the refusal to furnish the cars could be had in absence of an administrative ruling by the Commission.

In view of these cases, the Commission, which admittedly has power over rates, would seem necessarily also to have control over car facilities.

4. Control by the Commission is imperatively required if the purpose of the act to prevent discrimination is to be effectuated.

Although the necessity for uniform common control over the car equipment of interstate railroads appears plainly enough from the administrative character of the problems involved, the simplest and most cogent

consideration, leading to the same result, is based upon the inseparable connection of the problem of adequate car facilities with that of discrimination.

The great purpose of the Act to Regulate Commerce to prevent discrimination has been recognized in many cases before this court. *Texas & Pacific Ry. Co. v. Abilene Oil Co.*, 204 U. S. 426; *Interstate Com. Comm. v. Illinois Central R. R. Co.*, 215 U. S. 452. The prohibition against discrimination extends not only to rates but also to car facilities. *Balto. & Ohio R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481; *Morrisdale Coal Co. v. Penna. R. R. Co.*, 230 U. S. 304.

If the duty to furnish cars is to be enforced by suits for damages or by mandamus proceedings in the courts rather than by administrative rulings by the Commission, discrimination must inevitably result from the variety and contrariety of the judgments and opinions of the various courts and juries to which the question is submitted. Examples of such contrariety of judgment are given in the opinion in the *Pitcairn* case, 215 U. S. 495 *et seq.* If the case does not involve a clear and unequivocal breach of duty by the carrier viewed from any standpoint, but an excuse is presented dealing with any of the various questions proper to be considered in the exercise of administrative discretion, such as the foreseeability of an increased demand for cars, the reasonableness of compliance therewith, the rules for return of cars in use on other railroads, etc., a

suit in one court might result in an order of mandamus requiring a railroad in one district to furnish a particular shipper with cars, and a suit presenting precisely similar facts in another district might result in the denial of relief to a complaining competitor.

We are now dealing with the cases at bar on the basis that the legal obligation to furnish tank cars is acknowledged, and that the only question is simply whether the courts or the Commission is to enforce that duty. When once the true nature of the inquiry is thus clearly appreciated, the conclusion is inevitable—if the purpose of the act as a whole is not to be largely frustrated—that the administrative power in question lies with the latter tribunal. The doctrine of the Abilene and Pitcairn cases irresistibly requires that the jurisdiction of the Commission be sustained.

On the whole it seems that the majority of the court below, and the dissenting commissioners, failed to grasp the effect of the Hepburn and Mann amendments. They held the power was not granted to the Commission because not done by express particular words. The Government insists that the language of sections 1, 12, and 15 clearly confers the power. But, even if the terms were not clear, the great basic purposes of the act would require such jurisdiction by necessary implication.

5. The order involves the exercise of no new or unusual power by the Commission.

Railroads are universally recognized to be public agencies. See *Mich. Cent. R. R. Co. v. Mich. R. R. Comm.*, 236 U. S. 615, 632. Prior to 1906 the power which the railroads had over their equipment and facilities for interstate transportation was unrestrained by statute. Railroad officials were able to retard the development of whole communities by refusing altogether to provide adequate transportation facilities; and by furnishing facilities to favored shippers, at the same time refusing them to competitors, they could crush out the unfortunate interests. Examples of the exercise of this power have been seen. *Supra*, p. 34. The prohibitive difference between the cost of transportation of oil by barrels and by tank cars at the present time shows that, unless restrained, the power still may be ruinously exercised.

The act does not now propose to transfer to the Commission the power which railroad officials as public agents have had. The claim that if the jurisdiction of the Commission is upheld the boards of directors of the railroads will be thereby supplanted is fantastic. It is still for the railroads to initiate their regulations and practices. The Commission exists not as a substitute for boards of directors but merely to prevent a breach of their public duty. It may interfere, not to impose new duties but to remedy violation of those established. The

statutory provision is simply precaution against abuse of the powers of one public body by control by another.

The limited character of the Commission's powers appears from another angle. The act does not require a railroad to be built, but only that when a railroad has been built adequate transportation thereon shall be furnished. For the act in section 1 defines "railroad" as including "all bridges and ferries used or operated in connection with any railroad, and also all the road in use * * * all switches, spurs, tracks, and terminal facilities of every kind * * * and also all freight depots, yards, and grounds * * *." Act of June 18, 1910, c. 309, 36 Stat. 545. It imposes upon the carrier no duty to furnish a railroad. The words are that the carrier must provide and furnish only "transportation" upon reasonable request.

In providing a remedy for violation of the railroad's duty statutory safeguards of the rights of the railroad are furnished. There must be a hearing, investigation, adequate evidence. Thereafter order may issue only if the request for transportation is reasonable.

Finally, assurance against arbitrary action by the Commission is guaranteed by the control of the courts.

Judicial remedy for violation of the railroad's duty to furnish adequate service has been found in

the past directly in the processes of the courts.¹ This has not been thought to substitute the judgment of the court for that of the railroad officials. The administrative remedy by the Commission does so to no greater extent.

Many State statutes have been passed regulating in details the railroad's facilities of transportation.²

¹ Mandamus was awarded to compel, in *People v. St. Louis &c. R. R. Co.*, 176 Ill. 512, the operation of a separate passenger train; in *State ex rel. Ellis v. Atlantic Coast Line R. R. Co.*, 53 Fla. 650, the repair of road bed and track; the furnishing of coal cars in *Lorraine v. R. R. Co.*, 205 Pa. St. 132; the resumption of a branch street railway service in *State v. Spokane St. Ry. Co.*, 19 Wash. 518; the establishment and maintenance of a station in *People v. C. & A. R. R. Co.*, 130 Ill. 175, and in *State v. Rep. V. R. R. Co.*, 17 Neb. 647. In all of these cases there was no statutory or charter duty, but the writ was awarded solely to enforce the common law duty. The difficulties of remedy by mandamus are manifest. Where the duty has been imposed by statute or charter, mandamus has been frequently awarded. See, for example, *U. P. R. R. Co. v. Hall*, 91 U. S. 343; *State v. R. R. Co.*, 29 Conn. 539. In *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, a court of equity ordered adequate stock yards delivery service.

² Cases in this court only are cited as illustrative: *Minn. &c. R. R. Co. v. Minn.*, 193 U. S. 53 (stations); *Mich. Cent. R. R. Co. v. Mich. R. R. Comm.*, 236 U. S. 615; *Grand Trunk Ry. v. Mich. Ry. Comm.*, 231 U. S. 457 (interchange of traffic); *Wis. &c. R. R. v. Jacobson*, 179 U. S. 287 (track connections for interchange of traffic); *Atlantic Coast Line R. R. Co. v. N. Car. Corp. Comm.*, 206 U. S. 1 (change in time schedule to afford connection); *C. M. & St. P. Ry. v. Iowa*, 233 U. S. 334 (acceptance of loaded cars from another line); *Mo. Pac. Ry. Co. v. Kansas*, 216 U. S. 262 (operation of passenger train); *Illinois Central R. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275; *Penna. R. R. Co. v. Clark Coal Co.*, 238 U. S. 456; *Hampton v. St. Louis &c. Ry.*, 227 U. S. 456 (furnishing of cars); *Lake Shore &c. Ry. v. Ohio*, 173 U. S. 285 (stopping of trains).

These statutes have gone beyond specification of the common law duty, and remedies for breach thereof. Such interference with the discretion of railroad officials has not been held undue. Obviously questions of adequacy of service to accommodate the public depend upon the particular facts in individual cases and are most fit for determination by an expert administrative tribunal.

III.

The order is not subject to the objection that it compels the use of cars beyond the line of the railroad.

This objection, as well as the other subordinate objections subsequently discussed, were not considered in the opinion of the court below. It is, of course, settled that "if the order made by the Commission does not contravene any constitutional limitation and is within the constitutional and statutory authority of that body, and not unsupported by testimony, it cannot be set aside by the courts, as it is only the exercise of an authority which the law vests in the Commission." *Pennsylvania Co. v. United States*, 236 U. S. 351, 361. In other words only "power to make the order and not the mere expediency or wisdom of having made it, is the question." *Interstate Com. Comm. v. Illinois Central R. R. Co.*, 215 U. S. 452, 470.

Although the complaining refiners' works seem to be on the line of the New York Central Railroad (R. 20, 21) as well as on the line of the Pennsylvania R. R. Co., the order of course does not require the

Pennsylvania Company to furnish cars for initial movement on the New York Central line.

It is not shown that any cars were or will be requested for shipment beyond the lines of the Pennsylvania Railroad Company. The implication is otherwise. In paragraph 5 of the complaint of the Pennsylvania Paraffine Works filed with the Interstate Commerce Commission the complainant alleges (R. 8)—

* * * that the lines, trackage, and railway of said Pennsylvania Railroad Company run and reach the several points and places where your complainant is requested to and does deliver its oils, gasoline, and the products of its refinery to its customers and purchasers of the products of said refinery. That with proper and efficient methods and fair service on the part of the said railroad company, substantially all the products of such refinery would and should be transported over the lines of said Pennsylvania Railroad Company.

In the *Crew-Levick* case (R. 7, No. 340), the complainant before the Interstate Commerce Commission alleged:

* * * that the lines, trackage, and railway of said Pennsylvania Railroad Company run and reach the several points and places where your complainant is requested to and does deliver its oils, gasoline, and the products of its refinery at or near Warren, Pa.

The report of the Commission stated (R. 21):

* * * Complainants assert that defendant's line is the most direct route to nearly

all of the destinations to which they are accustomed to ship, and that with fair service on defendant's part substantially all of the products of complainants' refineries would be transported over its line.

If under the order made in this case the railroad company should be requested to send one of its cars beyond the limits of its line it would then be time for the railroad to raise objection. In this proceeding it is premature.

That the Commission has power, however, incident to its control over through routes and interchange of cars, to compel the shipment of cars beyond the limits of the line of any railroad company would seem to follow from the cases of *Louisville & Nashville R. R. Co. v. United States*, 238 U. S. 1; *Michigan Central R. R. Co. v. Michigan R. R. Comm.*, 236 U. S. 615; *Missouri & Illinois Coal Co. v. Ill. C. R. R. Co.*, 22 I. C. C. 39. The Commission, as we have seen, has ample power to provide for compensation for the use of a railroad's equipment on the line of a connecting road, and to provide for the prompt return of such equipment or adjustment for loss or damage thereto, and to require a connecting carrier to furnish its proper quota of cars (R. 33). *Supra*, pp. 66, 67. As was said in the *Michigan Central R. R. Co.* case, 236 U. S. 615, where a writ of mandamus compelling interchange of cars between connecting carriers in interstate traffic was sustained:

(p. 631) That it is not as a rule unreasonable to require such interchange of cars sufficiently

appears from the universality of the practice, which became prevalent before it was made compulsory, and may be considered as matter of common knowledge, inasmuch as a freight train made up wholly of the cars of a single railroad is, in these days, a rarity. * * *

(p. 632) To speak of the order as requiring the cars of plaintiff in error to be delivered to the Detroit United "for the use of that company" involves a fallacy. The order is designed for the benefit of the public having occasion to employ the connecting lines in through transportation. The Detroit United, like the Michigan Central, acts in the matter as a public agency.

* * * Certainly the order does not exclude the ordinary remedies for delay in returning cars or for loss or damage to them. Nor does it contemplate that plaintiff in error shall be required to permit the use of its cars (or of the cars of other carriers for which it is responsible) off its line without compensation.

As showing that matters of compensation for the use of cars by a connecting carrier are not open in this proceeding, the case of *Pennsylvania Co. v. United States*, 236 U. S. 351, is pertinent. In that case an order of the Commission required the cessation of discrimination in accepting through cars, but did not provide the rates and division of joint receipts or compensation for service rendered. It was held that the petition for preliminary injunction against en-

forcement of the order should be dismissed. The court said (pp. 361, 362):

It is to be remembered that in the aspect which the case now presents, there is no question as to the terms which the Commission might prescribe, or the compensation which the Pennsylvania Company should receive for the service to be rendered. The sole question is whether the Commission exceeded its authority in requiring the Pennsylvania Company to cease and desist from what the Commission found to be a discriminatory practice.

IV.

The order is not void because indefinite or uncertain.

The order is definite and certain. It disposed of the only controversies before the Commission. These related to the general duties of the carrier in the premises and the jurisdiction of the Commission to order the duties performed.

The order follows the language of the statute. None would contend that the statute is void for uncertainty. It is as simple to obey the one as the other.

The order seems as definite as that upheld in *Pennsylvania Co. v. United States*, 236 U. S. 351. See also *Baltimore & Ohio R. R. Co. v. Interstate Com. Com.*, 221 U. S. 612, 621, 622.

Moreover, the order is as specific as it could reasonably be. It is found that the railroad has not furnished sufficient tank cars to supply the reasonable demands of the complainant shippers. The

shippers' requirements and the demands made are known. The order requires the railroad to furnish upon reasonable request and upon reasonable notice at complainants' respective refineries tank cars in sufficient number to transport complainants' normal shipments. The opinion of the Commission with reference to normal shipments states (R. 33, 34):

One of the tests which may be relied upon in determining the reasonableness of a shipper's request for cars is to be found in the volume of his shipments in the past, due allowance being made for the growth of his business. Complainants have not only shown that the volume of their past shipments is such as to justify the demands for equipment which they have made but also have introduced evidence tending to show that in the future the volume of their business will be as great as in the past. Defendant will be required, upon reasonable request and reasonable notice, to furnish tank cars in sufficient number to move complainants' normal production. Defendant can not be required to furnish all the cars which may be demanded by complainants under extraordinary conditions arising from exceptional causes, which could not reasonably have been anticipated and which make it physically impossible to furnish all the cars desired.

Thus normal shipments are defined to be those which are reasonably to be anticipated in the light of past demands. There can be little doubt that the railroad will have no difficulty in complying with the order.

The objection again is premature. Until the railroad has made some effort to comply, it is in no position to urge on petition for a preliminary injunction that the order is indefinite.

V.

The order does not require an unlawful interference with the rights of owners of private cars.

The order itself contains no word with reference to the distribution of cars owned or leased by private shippers. The statement in the opinion of the Commission that privately owned cars are available, means, of course, with the consent of the owners. The rule, moreover, that in the future the carrier must count as part of its equipment all of the privately owned cars on its lines is in accordance with sound law. It was held in *Interstate Com. Comm. v. Illinois Central R. R. Co.*, *supra*, and *Balto. & Ohio R. R. Co. v. Pitcairn Coal Co.*, *supra*, that private fuel cars, company fuel cars and foreign owned fuel cars must be counted in the distribution of coal cars as part of the carrier's equipment. The Act to Regulate Commerce states that the duty to provide and furnish cars exists "irrespective of ownership or of any contract, express or implied, for the use thereof." A railroad could not purchase cars with a contractual limitation that they be used for the benefit of particular shippers only. This would be too easy a method of discrimination. A similar result can not be accomplished by the device of leasing. The rule

announced by the Commission for guidance of railroads in the future is correct: "Carriers should lease cars only upon such terms as permit them to meet their obligation to furnish cars without discrimination" (R. 33).

The rights of private car owners, it may be noted, cannot be asserted in this case by the railroad.

The question, furthermore, may never arise. The railroad company may furnish a fully adequate supply of cars to meet the complainants' needs by building cars of its own, by buying or borrowing, or by leasing from a private car line company. So this objection also is premature.

VI.

The order afforded sufficient time for compliance.

The order was entered on May 11, 1915, to be effective on August 15, 1915 (R. 35, 36). From the answer of the Crew-Levick Company, intervenor, it appears that the effective date of the order was postponed for ninety days, or until November 15, 1915 (R. 42, 43, 48). It appears in no way that the carrier could not have purchased, or leased, or built tank cars prior to that time if a *bona fide* effort had been made. The Commission suggested that the railroad may comply with the order by leasing a portion of the 13,000 tank cars owned by independent lines (R. 33). In absence of any effort by the carrier to observe the order, the objection again seems not available. Moreover, the duty to provide tank cars existed prior

to the date of the order, for the duty is imposed not by the order but by the statute.

CONCLUSION.

The decree of the District Court should be reversed, with direction to dismiss the petition.

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SEPTEMBER, 1916.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

UNITED STATES, INTERSTATE COM-
merce Commission, et al., Appel-
lants,

v.

PENNSYLVANIA RAILROAD COM-
pany, Appellee.

Nos. 340 and 341.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

These appeals are prosecuted by the United States, the Interstate Commerce Commission, and the Crew-Levick Company, a corporation, from a judgment of the District Court of the United States for the Western District of Pennsylvania granting an interlocutory injunction against the enforcement of an order of the Interstate Commerce Commission requiring the Pennsylvania Railroad Co. to provide and furnish tank cars for the shipment of petroleum products. *Pennsylvania Paraffine Works v. Pennsylvania Railroad Company*, Docket No. 5574, and *Crew-Levick Company v. Same*, Docket No. 5574, Sub. No. 1. The Commission disposed of the two cases in one report, 34 I. C. C., 179, and issued one order covering both complaints, but the Pennsylvania Railroad Co. filed two suits against the United States to enjoin the enforcement of the order. The Com-

mission intervened in both suits. The injunction was granted by Circuit Judge Woolley and District Judge Orr, a dissenting opinion being delivered by District Judge Thompson. *Pennsylvania R. Co. v. United States*, 227 Fed., 911.

The Pennsylvania Paraffine Works and the Crew-Levick Company, complainants before the Commission, when referred to jointly in this brief, will be called the complainants, and the Pennsylvania Railroad Company will be referred to as the Railroad.

The complainants, refiners of crude oil, in their complaint before the Commission prayed for an order requiring the Railroad to furnish tank cars, or rather to furnish transportation as required by the act to regulate commerce. The Railroad challenged the power of the Commission to enter such an order, but the Commission decided that it had jurisdiction of the matter in dispute, and entered an order, the material part of which is as follows:

It is ordered, That the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist on or before August 15, 1915, and thereafter to abstain, from refusing upon reasonable request and reasonable notice therefor to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the act to regulate commerce and amendments thereto.

It is further ordered, That said defendant be, and it is hereby, notified and required to

provide, on or before August 15, 1915, and thereafter to furnish, upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

The petition filed by the Railroad in the District Court assailed the order of the Commission upon the following grounds:

I. That neither the act to regulate commerce nor any other law imposes upon the Railroad an obligation to supply tank cars for the transportation of oil.

II. That neither the act to regulate commerce nor any other law confers authority upon the Interstate Commerce Commission to make the order referred to in the petition.

III. That the order requires the Railroad to furnish tank cars for interstate shipments when consigned to points on other lines of railroad, and is in that regard without lawful warrant and in violation of the fifth amendment to the Constitution of the United States.

IV. That the order assumes to require the Railroad to seize all tank cars which happen to be on its line, regardless of their ownership, and to furnish them to complainants, and would therefore subject the Railroad to liability in actions for damages by the owners of such cars, thus causing the order to be unlawful and in violation of the fifth amendment.

V. That the time given for compliance with the order is insufficient, and that the order is in this regard also without lawful warrant and in violation of the fifth amendment.

VI. That the order is uncertain and indefinite.

The findings of fact made by the Commission are not disputed and are substantially as follows, Printed Record, pages 18, 19, 20:

The Pennsylvania Paraffine Works has its office and refinery at Titusville, Pa., and the Crew-Levick Co. operates the Glade Oil Works at Warren, Pa. For two years last prior to the hearing before the Commission the Pennsylvania Paraffine Works had been refining about 20,000 barrels of crude oil per month and the Glade Oil Works from 15,000 to 16,000 barrels per month. During the 10 months of 1913 for which results were shown before the Commission the shipments of the Pennsylvania Paraffine Works averaged over 750,000 gallons per month, and the shipments of the Glade Oil Works over 500,000 gallons per month. Of the shipments made by the Pennsylvania Paraffine Works 91 per cent moved in tank cars, $1\frac{1}{2}$ per cent in barrels loaded in cars other than tank cars, and $7\frac{1}{2}$ per cent in pipe lines, while of the shipments made by the Glade Oil Works 86.8 per cent moved in tank cars, 4.7 per cent in barrels, and 8.5 per cent in pipe lines.

For a long time the bulk of the refined product of petroleum in the United States has been shipped in tank cars, and at present 91 per cent of the refined oil produced in this country is so transported. It was testified before the Commission that the Railroad has been using tank cars for the shipment of oil for more than 25 years.

The tank cars now in common use for the transportation of oil have a capacity of from 6,000 to 12,000

gallons each. These cars are so constructed that they may be rapidly loaded at the refinery, and jobbers and dealers in the refined product throughout the country have the proper and necessary facilities for unloading tank cars by gravity at their various stations.

The only other method of transporting oil by rail is in barrels or similar containers loaded in box cars. The cost to the purchaser of oil transported in barrels is from $3\frac{1}{2}$ to $3\frac{3}{4}$ cents per gallon above the cost when transported in tank cars. This higher cost is due to the additional weight upon which freight charges must be paid, depreciation in the value of the barrels when used, greater waste than when transported in tank cars, and additional expense of handling and delivering. The addition of $3\frac{1}{2}$ cents per gallon to the cost of oil when transported in barrels makes that method of transportation practically prohibitive, and the refusal of the Railroad to furnish an adequate supply of tank cars would tend to drive out of business refineries which are unable to supply themselves with enough tank cars to move their own products. Even witnesses who appeared before the Commission in behalf of the Railroad admitted that tank cars are an economic necessity for the transportation of refined products.

In 1887 the Railroad acquired 1,308 tank cars, some of which have since been sold to independent refineries. At the time of the hearing before the Commission the Railroad owned 499 tank cars, all that remained of those purchased in 1887, and 482

of which are furnished to shippers of oil located on its lines.

At the time of the hearing before the Commission the Pennsylvania Paraffine Co. owned 54 tank cars and the Crew-Levick Co. 57 tank cars. It was testified that during the five or six years prior to the hearing complainants had made daily inquiry for the delivery of cars to their refineries and that a formal order for cars had constantly been on file in the Railroad's offices at Titusville and Warren.

On November 11, 1912, shortly prior to the filing of the complaints before the Commission, complainants served the Railroad with formal notices requesting it to furnish a sufficient number of tank cars to ship, respectively, 450,000 gallons of oil per month from the Pennsylvania Paraffine Works refinery at Titusville and 600,000 gallons per month from the Glade Oil Works at Warren. To this request the Railroad's answer, through its general manager, was as follows:

We beg to say that the railroad company is not prepared to increase its present tank-car equipment, but is prepared to transport the commodity, when properly contained in barrels or other similar containers, at rates that are fair and reasonable and nondiscriminatory.

In its answer before the Commission the Railroad alleged that while it publishes rates on oil and gasoline in bulk, it publishes in its tariffs the statement that *it does not assume any obligation to furnish tank cars.*

A majority of the Commission, after full consideration, found that the act requires every interstate carrier upon reasonable request therefor to furnish cars for interstate shipments and that the requests of the complainants for tank cars for the shipment of oil were reasonable, and should be granted.

The two judges who issued the injunction were of the opinion that the act to regulate commerce imposes upon a carrier no duty to *provide* cars for the movement of its normal traffic, but merely requires the carrier to furnish without discrimination such cars as it is able to furnish from its available supply. District Judge Thompson, dissenting, was of opinion that the act imposes upon a carrier the duty to *provide and furnish* upon reasonable request such cars as are reasonably necessary for the movement of the normal traffic which it undertakes to carry, and that it is the duty of the Commission upon complaint to determine the reasonableness of a shipper's request for cars, the ability of the carrier to procure cars being one of the elements to be considered in determining that question.

ARGUMENT.

I.

It is the duty of every interstate carrier to provide and furnish upon reasonable request such cars as are reasonably necessary for handling the normal traffic of which it is a common carrier.

(a) *The act to regulate commerce requires carriers to furnish cars upon reasonable request.*

The first section of the original act to regulate commerce, merely provided that the term "transportation" should include "all instrumentalities of shipment or carriage," without any provision that such transportation should be provided or furnished upon request. By the amendment of June 29, 1906, known as the Hepburn Act, however, it was provided that "the term 'transportation' shall include *cars and other vehicles and all instrumentalities and facilities* of shipment or carriage," the words italicized being inserted by the amendment, and the following words being added:

* * * irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to *provide and furnish* such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto. [Italics ours.]

The word "provide" as here used is significant. The Standard Dictionary defines the word as follows: "To make, procure, or furnish for future use; obtain so as to have ready or on hand when needed; prepare, as, to *provide* food for the journey." Another definition given is: "To furnish with supplies or prerequisites; put into a state of preparation; as, we are well *provided* with money."

It is the duty of every carrier under the act to *provide* and *furnish* such transportation upon reasonable request therefor. In other words, it is the duty of every carrier to provide and furnish "cars and other vehicles, and all instrumentalities and facilities of shipment, or carriage, irrespective of ownership," upon "reasonable request therefor." The only limitation is the "reasonableness" of the request.

The use of the two words "provide" and "furnish" in the act is for a purpose.

Every word in a statute must be given a meaning, if not in conflict with general intent.—
Sutherland on Statutory Construction, sec. 380.

The two words *provide* and *furnish* are not synonymous, and impose the positive duty upon the carrier of reasonably equipping itself with facilities and the further duty of furnishing those facilities to shippers upon reasonable request.

In other words, the carrier must *prepare* to furnish, and must then *furnish* upon reasonable request, such cars as are reasonably necessary to supply the demand that may be expected; and when reasonably requested to furnish cars it will not be heard to say

that it has not prepared itself to furnish cars which it had reasonable ground to believe that it would be called upon to furnish.

In *Scofield et al. v. Lake Shore & Michigan Southern Ry. Co.*, 2 I. C. C., 90, 117, decided before the amendment to section 1 referred to above, complainants sought to compel the defendant carriers to furnish tank cars for the shipment of oil, but the Commission, holding that the duty of a carrier to provide cars was not a duty imposed by the act, denied the relief sought for the reason, as stated, that—

The statute does not undertake to clothe the Interstate Commerce Commission with the power by summary proceeding of compelling a railroad company to perform all its common-law duties, but leaves many of these to be enforced in the courts by suits for damages and by other proceedings.

This decision was reported to Congress, and it must be presumed that in the enactment of the Hepburn amendment expressly imposing upon carriers the duty to *provide and furnish* cars upon reasonable request, Congress had in mind the decision of the Commission last cited. The amendment imposing the duty to provide and furnish cars must, therefore, have been intended to supply the defect in the power of the Commission which that body had found to exist, as well as to enlarge the then existing common-law duty of carriers to provide and furnish cars. The definition of "transportation" in the original act may have been sufficient to include cars, but the duty

to provide and furnish *transportation* as defined was not imposed by the act prior to the Hepburn amendment.

(b) *It is the legal duty of the carrier to furnish the character of cars reasonably necessary for transporting the particular traffic which it offers to carry.*

That a common carrier may be required to furnish a sufficient number of cars to take care of its ordinary and usual traffic is elementary. *Houston & Texas Central R. Co. v. Mayes*, 201 U. S., 321, 331; *Chicago, R. I. & P. Ry. Co. v. Hardwick Elevator Co.*, 226 U. S., 426; *Eastern Ry. Co. v. Littlefield*, 237 U. S., 140; *Pennsylvania R. Co. v. Puritan Coal Co.*, 237 U. S., 121, 133.

This doctrine is not denied by the Railroad. Its contention is that no duty rests upon it to furnish a certain kind of cars or equipment. The determination of this question however depends upon whether such equipment is one of the facilities of transportation which the act declares a carrier must furnish. The duty of providing transportation is not fulfilled when any kind of a car is furnished a shipper. It must be adequate to the reasonable needs of the shipper. It would not be contended that a carrier could dispense with all its box cars and meet the requirements of the act by furnishing flat cars or gondolas to shippers of perishable freight. And when a commodity requires a special kind of car for its shipment, and this requirement has been recognized for more than 25 years by the use of such special equipment, a carrier to which such traffic is offered

has not fulfilled its duty until it has furnished adequate facilities for handling it.

It is argued that tank cars are of such unusual and peculiar construction that they can not be used for other traffic, and that therefore the carrier can not be required to furnish such special facilities unless it elects to do so. The petition, however, does not question the finding of the Commission as to the general and long-continued use of tank cars for the shipment of petroleum in bulk, or the finding of the Commission that tank cars are an economic necessity for the shipment of refined products of petroleum. The finding of the Commission that the railroad publishes rates for the shipment of oil in tank cars is also undisputed. If tank cars had not long been in general use for the shipment of oil, and if the Railroad had never held itself out as a common carrier of oil in tank cars, there might be some plausibility in the contention that the carrier can not be required to supply itself with such cars, but there is no room for such a contention, when 91 per cent of the refined oil of the country is carried in such cars, and it is conceded that the railroad has long published rates on oil carried in tank cars, and has itself furnished tank cars for such shipments.

The facilities furnished by the carrier must be such as are reasonably required for the handling of the traffic which it offers to carry, and the fact that a particular kind of traffic requires facilities which are not required for other kinds of traffic furnishes no reason why the carrier should not furnish such

facilities, if it holds itself out to the public as a common carrier of traffic of that kind.

In *Oregon R. R. Co. v. Fairchild*, 224 U. S., 510, 529, the court said:

If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, even though "the furnishing of such necessary facilities may occasion an incidental pecuniary loss."

In *Covington Stock Yards v. Keith*, 139 U. S., 128, 133, Justice Harlan said:

The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the places to which it is consigned. The vital question in respect to such matters is whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public.

This vital question, prescribed by Justice Harlan as the test of the carrier's duty, is to be answered in the first instance by the Commission.

Again, at page 135 the court, in the case last cited, said:

The carrier must at all times be in proper condition both to receive from the shipper

and to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered.

(c) *The common-law duty of carriers to furnish adequate equipment is not restricted by the act to regulate commerce.*

The duty to furnish cars which rested upon carriers at common law was the duty to furnish a sufficient number of cars for their usual and ordinary traffic. *Houston & Texas Central R. Co. v. Mayes*, 201 U. S., 321, 331. And it was no defense to an action at common law to recover damages for failure to perform that duty that the carrier had not supplied itself with a sufficient number of cars to enable it to perform the duty. If the normal traffic of the carrier required a certain kind or number of cars, and it negligently or wilfully failed to procure such cars when by the exercise of reasonable care it might have done so, it could not escape liability by showing that it did not have the cars.

We submit that there is no reasonable basis for the suggestion by counsel for the Railroad that the common-law duty of a carrier was restricted by the act to regulate commerce. No reason therefor appears in the circumstances surrounding its passage. There was no intimation of a policy to lighten the burdens which the common law imposed upon carriers. The statute was enacted primarily for the benefit of shippers.

The only justification for a theory that the common-law duty to furnish transportation was limited in the act would be words of limitation in the statute itself. But there are no such words of limitation.

It can not fairly be contended that the common-law duty of carriers in this regard exceeded the duty imposed by the words of the act—

* * * to provide and furnish cars and
other vehicles and all instrumentalities and
facilities of shipment or carriage irrespective
of ownership * * * upon reasonable re-
quest * * *

The common-law duty of carriers to provide facilities of transportation is a duty extending to any kind of equipment that is reasonably necessary for hauling the special character of freight. In *Ray on Freight Carriers*, section 4, page 17, it is stated:

A railway company is bound to provide cars reasonably fixed for the conveyance of the particular class of goods it undertakes to carry. It is the duty of the carrier to provide suitable means of transportation adapted in each case to the particular class of goods he undertakes to transport.

In *Baker v. Boston & M. R. Co.*, 65 Atlantic Reporter, 386, 390, it was held that it was the defendants' duty to provide suitable cars in which to transport milk.

In *State v. Florida East Coast Ry. Co.*, 50 Southern Reporter, 425, 427, it was said:

The duty of a railroad company to furnish reasonably adequate facilities is commen-

surate with the powers and privileges conferred upon the corporation and the just requirement of the public to be served by it. In determining the obligation of the corporation in the discharge of its duties to the public, the corporate business as a whole, the character of the service required, the need of its performance, and the various rights of the public and of the carrier should be considered.

In *St. Louis, I. M. & S. Ry. Co. v. State*, 104 Southwestern Reporter, 1106, 1107, it was held that a carrier is bound to furnish facilities for receiving cotton at its stations, and if its platforms are filled, that it must furnish *additional* platforms or respond in damages. The court said:

In this case it appears from the evidence—at least the evidence warrants the conclusion—that sufficient platform facilities for receiving cotton were not provided by appellant. During the cotton-shipping season of 1905, the platform was insufficient to hold the amount of cotton ordinarily on hand awaiting transportation. When this cotton was offered for shipment, the platform was covered with cotton from one to three bales deep, necessitating unusual trouble and expense in putting more upon the platform. This was an extraordinary expense which the carrier should have borne, instead of imposing it upon the shipper, as it was the fault of the carrier that more abundant facilities had not been provided. Nor was it a defense to show that an unusual emergency had caused a shortage of cars so that cotton could not be shipped out as rapidly as customary.

In Hutchinson on Carriers, 3d edition, section 505, the rule is thus stated:

If the goods are of such a nature as to require for their protection some other kind of car than that required for ordinary goods, and cars adapted to the necessity are known and in customary use by carriers, it is the duty of the carrier where he accepts the goods to provide such cars for their carriage.

In *Beard v. Railway Co.*, 79 Iowa, 518, 521, the Supreme Court of Iowa held that if *improved cars* for the transportation of articles of commerce liable to injury from heat were in use, it was defendant's duty to use such cars in carrying *butter*.

In *Merchants' Dispatch Co. v. Carnforth*, 3 Colorado, 280, it was held that the carrier must furnish special cars adapted to the shipment of *oranges and lemons*.

In *St. Louis, I. M. & S. Ry. Co. v. Renfro*, 100 Southwestern Reporter (Arkansas), 889, 891, it was held that it was the duty of the carrier to provide suitable cars for the shipment of *strawberries*.

Likewise, it is the duty of the carrier to furnish a special kind of cars for the shipment of *live stock*. Hutchinson on Carriers, 3d edition, section 509.

Under its common-law duty a carrier must furnish the proper and reasonable equipment for freight offered it for transportation, and even though this can not be done except by the purchase and installation of additional equipment, the carrier is not thereby relieved from its plain duty. The act to regulate commerce imposes upon the carrier the same obligation.

Indeed, we see no hardship imposed upon a carrier because in the expansion of its traffic new equipment becomes a necessity. In the case at bar it is only additional equipment, but if the Railroad owned no single tank car its duty would be the same. This is not an isolated offer of a shipment, but the undisputed proof shows that the shipments to transport which cars are requested normally amount to more than a million gallons of oil per month.

If some novel device unfamiliar to railroad transportation, used in rare instances, or subject to the whim of a shipper, were under consideration, the Railroad might have some just complaint.

But the conditions presented are very different. A great commodity of commerce is being regularly transported. Ninety-one per cent of the bulk of this commodity is transported in the particular equipment under consideration. This particular equipment has been in general use for transporting this commodity for 25 years. The Railroad has owned and still owns cars of the design required. It admits that it has not sufficient cars to transport the commodity offered it for shipment. It refuses to provide itself with a sufficient number of such cars; and it attempts instead to place upon the purchaser the burden of paying an additional cost of $3\frac{1}{2}$ cents per gallon.

It appears of record in this case that the Railroad at one time owned 1,308 tank cars. Many of these cars were sold, and at the time of this hearing the Railroad owned 499 tank cars.

If the Railroad, by selling some of its tank cars, could relieve itself of its legal obligation to provide and furnish such equipment, it could dispose of the remaining 499 tank cars, and a shipper and the Commission would, under the doctrine contended for by counsel for the Railroad, be powerless. Indeed, according to that argument, there would be no reason for the carrier to stop after selling its tank cars. It might sell off all its other equipment and would have no duty to furnish a shipper cars except such as it might not have sold and which it might have on hand.

The act to regulate commerce was intended to add to rather than to take from the common-law duties of carriers, and nothing short of a clear expression of intention to limit or restrict a particular common-law duty of carriers could authorize the conclusion that such a limitation or restriction was intended.

In *Chicago, Rock Island & Pacific Ry. v. Hardwick Elevator Co.*, 226 U. S., 426, 434, the court by Mr. Chief Justice White held a statute of Minnesota requiring carriers to furnish cars for interstate shipments to be unconstitutional because Congress had exerted its paramount authority over the subject. After quoting the declaration of section 1 of the act to regulate commerce that the word "transportation" shall include cars, and that "*it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor,*" the court said:

The purpose of Congress to specifically impose a duty upon a carrier in respect to the

furnishing of cars for interstate traffic is of course by these provisions clearly declared. That Congress was specially concerning itself with that subject is further shown by a proviso inserted to supplement section 1 of the original act imposing the duty under certain circumstances to furnish switch connections for interstate traffic, whereby it is specifically declared that the common carrier making such connections "shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper." Not only is there, then, a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty.

Other cases are to the same effect. *Yazoo & M. V. R. R. Co. v. Greenwood Grocery Co.*, 227 U. S., 1; *St. L., I. M. & S. Ry. Co. v. Edwards*, 227 U. S., 265; *Hampton v. St. L., I. M. & S. Ry. Co.*, 227 U. S. 456.

In none of the cases cited was there any suggestion that the duty to *provide and furnish* transportation imposed by the act is less extensive than the common-law duty to furnish transportation, and it seems that the word "transportation" as defined in the act includes some elements which the common-law duty to furnish transportation did not include.

In *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Dettlebach*, 239 U. S., 588, 594, decided January 10, 1916, in an opinion by Mr. Justice Pitney, the court held that the word "transportation" as de-

fined in the act was intended to include the responsibility of the carrier as warehouseman, and after quoting the provision of the Hepburn Act which we are considering, the court said:

From this and other provisions of the Hepburn Act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term "transportation" and subjected to the provisions of the act respecting reasonable rates and the like.

In *Union Pacific R. Co. v. Hall et al.*, 91 U. S. 343, 355, this court awarded mandamus to compel the Union Pacific Railroad Co. to operate its road as a continuous line as required by its charter.

The power to require a common carrier by railroad to operate its road implies the power to require it to acquire cars for that purpose, since the carrier might otherwise defeat any judgment rendered in the exercise of that power by refusing to provide cars for the conduct of its ordinary business.

In *Penn Refining Co. v. West N. Y. & P. R. Co.*, 208 U. S. 208, this court, by Mr. Justice Peckham, held that the Commission had erred in finding that a

carrier had unduly discriminated against a shipper of oil in barrels by charging him for the weight of the barrel package while making no charge for the weight of the tank car when the oil was shipped in such cars, and the carrier was not prepared to supply the complaining shipper with tank cars upon demand. The court, in this connection, at page 221 said:

We are unable to concur in this view. Because circumstances existed which prevented the economical use of the tank car by plaintiffs (no demand being made for the use of a tank car) is no ground for finding discrimination in the charge for the weight of the barrel package (such charge being in itself not an unreasonable one), while none is made for the tank containing the oil. *It might be different if plaintiffs desired tank cars and defendants failed to furnish them on demand.* [Italics ours.]

While the court further said in that case that it was not called upon to determine whether or not the carrier could have been required to furnish tank cars upon demand, we think the reasoning of the court indicates that it was of opinion that such a duty existed even at the time of the shipments there involved, which was prior to the amendment to the act declaring the duty to furnish cars upon reasonable request therefor.

It is urged by counsel for the Railroad that because the duty of a carrier to furnish cars for the movement of traffic over a lateral branch line of railroad with which it has been required to construct and operate

a switch connection is restricted by the use of the words *to the best of its ability*, and because other duties of carriers declared in the act are restricted by the use of similar words, the court must add to the requirement to provide and furnish transportation a like restriction. But even if that be conceded it does not follow that the carrier is to be the final judge of its ability to provide and furnish the transportation requested, or that the Commission can not determine that question of fact. There is no claim here that the Railroad is not able to provide tank cars, the defense being that cars of that type are not necessary for the movement of oil. The Commission, however, has found that such cars are reasonably necessary for that purpose, and it is not alleged that this finding of fact is not supported by substantial evidence. The Railroad claims that it is not *ready* to furnish the cars requested; in other words, it has failed to *provide as* required by the act, and it argues that for this reason it is not *able* to furnish such cars and therefore can not be required to furnish them.

It is useless, however, to consider the meaning of the words *to the best of its ability* or the meaning of similar words used in declaring other duties than the duty to furnish transportation, for the use of such words in other connections and the failure to use them in declaring the duty of carriers to provide and furnish transportation implies *that no such restriction was intended as to the duty to provide and furnish transportation*.

(d) *Shippers may compel carriers to furnish adequate cars.*

If the railroads were the final judges of the kind and number of cars they will provide, shippers would be entirely at their mercy, and when a producer or manufacturer should have located his plant on a railroad he could have no assurance that the carrier would continue to provide and furnish the equipment which his product might require. Nor could he afford to buy equipment for the reason that he could have no right to use it so long as the carrier might choose to provide its own equipment, and the carrier would be free to change its *practice* as to that matter from time to time as it might elect.

In *Atchison Railway Co. v. United States*, 232 U. S., 199, both the shipper and the carrier had contended for the privilege of icing cars for the shipment of fruit. This court held that practices relating to refrigeration, which is defined as a part of transportation, were within the control of the Commission, and sustaining the order of the Commission, said, page 214:

Whatever transportation service or facility the law requires the carrier to supply they have the right to furnish. They can therefore use their own cars and can not be compelled to accept those tendered by the shipper on condition that a lower freight rate be charged. So, too, they can furnish all the ice needed in refrigeration, for this is not only a duty and a right, under the Hepburn Act, but an economic necessity due to the fact that the carriers can not be expected to prepare to meet the

demand and then let the use of their plants depend upon haphazard calls, under which refrigeration can be demanded by all shippers at one time and by only a few at another.

It seems to follow that if the carrier can not be required to accept the facilities for refrigeration which the shipper offers, which must include refrigerator cars, the shipper must have the right to compel the carrier to furnish such cars, since the same reasons which *entitle* the carrier to furnish such cars must *compel* him to do so, as the shipper can not be expected to supply himself with equipment if he does not know whether or not the carrier will permit it to be used.

That Congress intended that the shipper should have the right to look to the Railroad alone for everything included in transportation as defined in the act, is shown by the debate in the Senate upon a proposed amendment providing that private car companies should be deemed common carriers. That proposed amendment was rejected, and we may assume that its rejection was for the reasons urged against it in debate. The following extract is from the debate in the Senate on May 7, 1906, Congressional Record, volume 40, page 6438:

Mr. CLAPP. * * * One difficulty to-day is that the shipper of fruit and other freight requiring refrigeration has to deal not only with the railroad company which transports that freight, but also he has to deal with the company owning these private cars; and while

it did not seem a bit feasible, if advisable, to eliminate the private cars, it did seem as though we ought to take one step forward and require the common carrier to furnish these cars, so far as the shipping public is concerned, so that the shipper would have to deal only with one corporation, and that would be the carrier, and the carrier would be free either to buy its cars, own its cars, rent its cars, or employ the cars owned by the private car line companies so long as in its last analysis the cost of transportation, including refrigeration and those things especially inherent in the private cars, was within the control of the Interstate Commerce Commission, and the shipper had to deal only with one person, and the Commission had to deal only with one person, and that the common carrier. So we provided first as to what a carrier—a railroad—should be, what transportation should be, bringing refrigeration, icing, and all these matters finally under the one head of transportation or freight so that it would simplify the subject both with the shipper and the Commission.

* * * * *

I hope before the Senate thus, within the purview of this law, legalize the operation of the private-car lines they will consider if it is not better, for the time being at least, to place every item of transportation subject to the railroads, so that the shipper and the Commission will have to deal primarily and exclusively with the railroad company alone.

The question before Congress, as appears from the debates, was whether the private car companies should be subject to the act so that the Commission might regulate their charges and have the power to remove discrimination by them in the distribution of their cars, or whether the railroads should be required to furnish cars of special types such as are owned by the private car companies, and it was decided that it would be wiser to impose upon the railroads the duty to provide and furnish cars, and give the Commission control over the cars through control over the railroads, leaving the railroads free, however, to obtain cars by lease or rental from the private car companies. Congress manifestly concluded that the carrier ought not to be free to compel the shipper to look to the private car companies for equipment of that type and thus make it necessary for the shipper to contract with persons other than the carrier for that element of transportation, when such persons would be under no obligation to furnish such equipment, and might discriminate at will between shippers. Congress therefore amended section 1 of the act so as to impose upon the carrier the duty of *providing* and furnishing cars upon reasonable request.

In *Missouri, Kansas & Texas Railway Co. v. Harris*, 234 U. S., 412, 418, the court, through Mr. Justice Pitney, said:

So in *Chicago, R. I. & c. Ry. v. Hardwick Elevator Co.*, 226 U. S., 426, it was held that since by the Hepburn Act, Congress had

legislated concerning deliveries of cars in interstate commerce by carriers subject to the act, specifically requiring the carrier to provide and furnish "transportation" (cars being embraced within the definition of the term) upon reasonable request, the authority of the State of Minnesota to legislate upon the subject of the delivery of cars when called for to be used in interstate traffic was superseded.

In *Ellis v. Interstate Commerce Commission*, 237 U. S., 434, the court, through Mr. Justice Holmes, at page 443, said:

The Armour Car Lines is a New Jersey corporation that owns, manufactures, and maintains refrigerator, *tank*, and box cars, and that lets these cars to the railroad or to shippers. * * * It is true that the definition of transportation in section 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the *carriers* shall furnish them upon reasonable request, * * *. [Italics ours.]

The effect of the decision of the court below is that the shipper, if he owns no tank cars, must contract with some private car company for the cars needed for his shipments, thus making it necessary for the shipper to deal with another than the carrier for one of the essential elements of transportation as defined in the act.

If the shipper is dependent upon private car companies for the cars he needs, then he must pay what-

ever such companies demand for the use of their cars, and if they choose to let his competitors have all their cars he is helpless, the Commission having no control over the charges of such companies and no power to require them to desist from discrimination.

(e) *The duty of the carrier to furnish adequate equipment is not abrogated by the carrier's giving notice in its published tariffs that it will not furnish cars.*

It is true the Railroad announces in its tariffs that it does not assume the duty to furnish tank cars, but a railroad company can not in that way abrogate the provisions of the statute. The Railroad, with equal claim of lawfulness, might publish tariffs for the transportation of any other class of freight and announce in such tariffs that it does not assume the duty to furnish cars therefor. The law makes it the duty of the carrier to "*provide and furnish*" cars upon reasonable request, and the carrier can not relieve itself of that duty either in whole or in part by announcements in its published tariffs.

The notice thus given in the tariffs merely confirms the view that the refusal to furnish tank cars is a practice the reasonableness of which is for the Commission to determine. The *publication* of the notice emphasizes the *unreasonableness* of the practice whereby shippers owning no tank cars are compelled to ship in barrels, and are for that reason unable to compete with shippers to whom tank cars are furnished by the Railroad.

Besides, the public is interested, and, as said in *Atchison Railway Co. v. United States*, 232 U. S., 199, 217, "neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay."

II.

The Interstate Commerce Commission is charged with the duty of enforcing the provision of the act requiring carriers upon reasonable request to provide and furnish cars for interstate shipments.

(a) *Failure to furnish cars may be the subject of complaint before the Commission under section 13 of the act.*

There is no escape from the conclusion that the failure of a carrier to provide and furnish cars upon reasonable request therefor is something omitted to be done by the carrier in contravention of the provisions of the act, and therefore an omission which may be made the object of a complaint under section 13, the first clause of which reads as follows:

That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts.

By other provisions of section 13 it is made the duty of the Commission to investigate complaints

under that section and to make appropriate orders relating to the matter or things concerning which the inquiry is had. It being clear, therefore, that the failure to furnish cars is a matter of which complaint may be made under section 13 of the act, it follows that the Commission has power to make any order that may be appropriate to the enforcement of the duty which the carrier has failed to perform. Besides, section 15 expressly makes it the duty of the Commission, when it has found any practice complained of affecting interstate traffic to be unreasonable or otherwise in violation of the act, to find and prescribe what would be a reasonable practice in the matter investigated and to make an order requiring the carrier to desist from the unreasonable practice prescribed. That duty is imposed by the first paragraph of the section in the following language:

That whenever, after full hearing upon a complaint made as provided in section thirteen of this act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this act, or that any individual or joint classifications, regulations, or practices whatsoever of

such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

- (b) *The reasonableness of a request of a carrier for transportation facilities is a question of fact within the primary jurisdiction of the Commission.*

It is important that some administrative board should have the power to determine questions of reasonableness as between the public and the carriers. As to certain matters Congress has prescribed absolute rules, as in the case of safety appliances with which cars are to be equipped. As to other matters the rule can not be absolute because of varying con-

ditions, some of which can not be anticipated, and as to such matters the carriers are required to be reasonable. What is reasonable, however, is a matter about which men may differ, and it is unthinkable that carriers under the act may be required to do only what *they* may deem to be reasonable, thus making them the final judges of the services which they shall render.

That Congress did not intend to make the carriers the final judges of what is a reasonable request for transportation, is evident from the express provision in the act whereby the determination of such matters is entrusted to the Interstate Commerce Commission.

The requirement to provide and furnish transportation *upon reasonable request* is not an absolute requirement to provide and furnish cars. The reasonableness of the shipper's request depends not only upon his needs but also to some extent upon the carrier's ability to *provide* the cars requested. Upon a complaint that the carrier has failed to provide cars as requested it is the duty of the Commission to consider all the elements which enter into the determination of the reasonableness of the shipper's request.

In *Chicago, Rock Island & Pacific Ry. v. Hardwick Elevator Co.*, 226 U. S., 426, *supra*, the court held that the various provisions of the act giving remedies for the enforcement of its provisions applied to the enforcement of the duty to provide and furnish cars.

In *Louisville & Nashville R. R. Co. v. Cook Brewing Co.*, 223 U. S., 70, the carrier had refused to accept interstate shipments of liquor consigned to certain points in Kentucky because a Kentucky statute prohibited shipments of liquor to such points. It was argued by the carrier that the shipper should have gone to the Interstate Commerce Commission for relief rather than to the courts, but this court, at page 83, noted that there was no claim that the commodities tendered were inherently dangerous to transport, or that the railroad company did not have transportation facilities, and held that as the case did not turn upon any administrative question there was nothing for the Commission to determine.

The court there clearly recognized the primary jurisdiction of the Commission to determine all questions as to the sufficiency of the carrier's transportation facilities.

In *Pennsylvania Co. v. United States*, 236 U. S., 351, 362, the court by Mr. Justice Day, after quoting the provision of the amendment of 1906 defining transportation, at page 363, said:

By the amendments to the act, the facilities for delivering freight of a terminal character are brought within the terms of the transportation to be regulated.

Whether the request of a shipper upon a carrier to furnish cars is a *reasonable* request is an administrative question as much within the primary jurisdiction of the Commission as a question regarding the reasonableness of rates.

As to the reasonableness of rates, the court held in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S., 426, that the primary interference by the courts with the administrative functions of the Commission was wholly incompatible with the purposes of the act to regulate commerce, and in *Baltimore & Ohio R. Co. v. Pitcairn Coal Co.*, 215 U. S., 481, 494, the court held that the same principle applied to the practices of carriers in the distribution of coal cars. To illustrate the confusion which would result from allowing the courts to pass primarily upon such questions, the court in the latter case said:

A particular regulation of a carrier engaged in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found the complaint is declared to be well founded. The administrative powers of the Commission are invoked concerning a regulation of like character upon a similar complaint. The Commission finds, from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If, on the contrary, the Commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the Commission was to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be

susceptible of being set aside by the action of a mere administrative body.

That was a case of inequality in the distribution of cars on hand, but the act gives the Commission as full power to determine the reasonableness of a carrier's refusal to provide and furnish cars as it does to determine whether or not inequalities in the distribution of cars are unduly preferential or discriminatory.

In *Mitchell Coal Co. v. Pennsylvania R. Co.*, 230 U.S., 247, 255, the court, through Mr. Justice Lamar, said:

The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute.

Continuing, at pages 256 and 257, the court said:

It is argued that this conclusion ignores sections 9 and 22, which give the shipper the option of suing in the courts or applying to the Commission. The same argument was made and answered in the *Abilene* case by showing that to permit suits based on the charge that a particular practice was unreasonable, without previous action by the Commission, would

repeal the many provisions of the statute requiring uniformity and equality. * * *

But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made, it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case, thereby giving every shipper equal rights and preserving uniformity of practice.

In *Morrisdale Coal Company v. Pennsylvania R. Co.*, 230 U. S., 304, 313, the court, through Mr. Justice Lamar, said:

These rulings as to the validity of a particular practice and the facts that would warrant a departure from a proper rule actually in force, are sufficient to show that the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission. It was distinctly so ruled in the *Pitcairn case*, 215 U. S., 481, and in *I. C. C. v. Illinois Central*, 215 U. S., 452. Those cases involve a consideration of the power of the Commission over the distribution of cars and held that the courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated. If

in those direct proceedings the courts could not pass upon the question of reasonableness of a method of allotting cars neither can it do so as an incident to an action for damages.

In *Pennsylvania Railroad Co. v. Clark Coal Co.*, 238 U. S., 456, 468, 469, the court, through Mr. Justice Hughes, said:

The question whether the rule or method of car distribution practiced by the railroad company was unjustly discriminatory was one which the Commission had authority to pass upon. *Inter Comm. Comm. v. Ill. Cent. R. R.*, 215 U. S., 452; *Same v. Chicago, &c., R. R.*, 215 U. S., 479; *Morrisdale Coal Co. v. Penna. R. R.*, 230 U. S., 304, 313; *Penna. R. R. v. Puritan Coal Co.*, 237 U. S., 121, 131. Further, by reason of the nature of the question involved in an attack upon the rule or method of the company in distributing cars, no action was maintainable in any court to recover damages alleged to have been inflicted thereby until the Commission had made its finding as to the reasonableness of the rule. * * * Rules as to car distribution that are unjustly discriminatory are within the purview of section three, and damages thereby occasioned, as well as those due to the exaction of unreasonable rates, arise from the violation of the act and their ascertainment is within the scope of the Commission's authority.

Loomis v. Lehigh Valley R. Co., 240 U. S., 43, was an action brought against the carrier in a New York court to recover damages for the failure of the

defendant to furnish adequate cars for transporting in bulk wheat, oats, rye, apples, cabbages, and potatoes. A shipper requested 200 cars suitable for transporting produce in bulk. The carrier instead sent ordinary box cars inadequate for the service until fitted with inside doors. The shipper constructed these doors and brought suit without prior resort to the Commission. This court held that the question as to the character of equipment which it was the duty of a carrier to furnish was an administrative question which the Interstate Commerce Commission must primarily determine. Speaking through Mr. Justice McReynolds, the court, at page 50, said:

In the last analysis the instant cause presents a problem which directly concerns rate making and is peculiarly administrative. *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 232 U. S., 199, 220. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. See *Penna. R. R. Co. v. Puritan Coal Co.*, *supra*, pp. 128, 129; *Penna. R. R. Co. v. Clark Coal Co.*, *supra*, pp. 469, 470.

If in respect of interstate business the courts of New York may determine, as original matters, rate-making problems, those in other States have like jurisdiction. The uncertainty and confusion which would necessarily result is manifest. Ample authority has

been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted.

In *United States v. Pacific & Arctic Ry. & Nav. Co.*, 228 U. S., 87, it was held that the courts could not determine matters of discrimination between carriers or shippers or the matter of giving or refusing joint traffic arrangements involved in an indictment until those matters had first been passed on by the Interstate Commerce Commission, and in that connection the court, after citing *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, and *Baltimore & Ohio Railroad Co. v. Pitcairn Coal Co.*, *supra*, said (108):

The purpose of the interstate commerce act to establish a tribunal to determine the relation of communities, shippers, and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment.

It is conceded that the Commission may require the carrier to desist from discriminatory practices in the distribution of *cars on hand*, but it is insisted that this is the full extent of the control of the Commission over the carrier's car supply. But no such limitation

is found in the act. The questions of reasonableness and discrimination are so bound up together that the Commission must have full power over both if discrimination is to be effectively prevented. Many practices are unreasonable because they make discrimination easy, and yet very difficult to detect. If a carrier is to be permitted to determine without control the extent to which it will *prepare to furnish* tank cars for the shipment of oil, it may supply itself with tank cars when the shipper whom it desires to favor needs them, and refuse to prepare to furnish such cars when the competitor of that shipper needs them, thus depriving the competitor who has no tank cars of his own and can not procure such cars of his right to ship his oil on equal terms.

In view of the fact that 91 per cent of the refined oil of the country is shipped in tank cars, the refusal to furnish tank cars for the shipment of oil in bulk is just as unreasonable as would be the refusal to furnish cars suitable for the shipment of grain or coal in bulk. Discrimination created by the unequal distribution of cars on hand is comparatively easy to detect and reach, but if a railroad should be permitted to determine finally the extent to which it would prepare to furnish cars the most flagrant discriminations would surely result which neither the Commission nor the courts would be able to reach. *The most effective way to prevent discrimination is to remove the opportunity for discrimination.*

(c) *Even if a shipper could bring a damage suit in court for the failure of a carrier to furnish cars, it would not follow that the Commission would be without jurisdiction to require the carrier to provide and upon reasonable request to furnish such equipment.*

It is clear that the question as to whether or not it is reasonable to require a carrier to furnish for the shipment of a particular commodity a particular type of car is an administrative question into the determination of which many elements enter which a body like the Commission is better fitted to determine than the courts. What would be fair to both parties under the circumstances must be considered. Besides, if one court should determine upon the application of one shipper that the carrier must furnish tank cars for the shipment of oil and another court should determine upon the application of another shipper that no such duty rests upon the carrier, the evils pointed out by the court in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, and *Baltimore & Ohio R. R. v. Pitcairn Coal Co.*, *supra*, as resulting from the primary interference by the courts with the administrative functions of the Commission would result.

In *Pennsylvania R. Co. v. Clark Coal Co.*, 238 U. S., 456, the Commission found a car distribution rule unjustly discriminatory under section 15, and further found the rule itself administered by the carrier so as to cause unjust discrimination. The shipper then sued

in a state court and recovered treble damages under a state statute. In reversing the judgment of the state court this court, at page 471, said:

It is said that the present action is brought to recover damages caused by the violation or discriminatory enforcement of the carrier's own rule, and that in such case, no administrative question being involved, resort to the Commission was not necessary. And this, it is urged, was held in *Penn. R. R. v. Puritan Coal Co.*, 237 U. S., 121. * * * The distinction, however, is apparent. In the cases cited the plaintiff had not invoked the jurisdiction of the Commission. In this case it had done so. It went before the Commission with its complaint under the act assailing the rule of the company, and it secured from the Commission a finding as to the illegality of the rule and the violation of the act. This proceeding established the character of the claim so far as interstate transactions were concerned, and it could be prosecuted solely under the federal statute.

In *Pennsylvania R. Co. v. Puritan Coal Co.*, 237 U. S., 121, 128, this court said:

It will be seen that this section [9] does more than create a right and designate the court in which it is to be enforced. It gives the shipper the option to proceed before the Commission or in the Federal courts.

(d) *The jurisdiction of the Commission extends to all the things included in the definition of the word transportation.*

The jurisdiction of the Commission to enforce the duty of the carrier to provide and furnish transportation must exist as to all the things included in the word transportation or as to none. That such jurisdiction does exist as to the duty to provide and furnish refrigeration was held by the court in *Atchison Railway Co. v. United States*, *supra*, and it should not be arbitrarily assumed that Congress intended to give the Commission jurisdiction to enforce that duty and yet intended to deny to the Commission the power to require carriers to provide and furnish cars upon reasonable request. In *Arlington Heights Fruit Exchange v. S. P. Co.*, 20 I. C. C., 106, 117, in which the order approved in *Atchison Railway Co. v. United States*, *supra*, was entered, the Commission said:

During the last season 40,000 carloads of citrus fruits moved from California to eastern markets, and during the present year that number will probably be increased to 50,000 cars. During many months nearly one-half of the entire eastern movement upon at least one of these transcontinental lines is made up of oranges and lemons. This vast tonnage should be handled in the most economical and satisfactory manner, and these carriers should furnish for that movement such cars as will effectuate that purpose. They have a right to insist upon a proper compensation for supplying that equipment, but they have no right

to say that old methods must continue in use and new methods held in abeyance rather than change the form of their cars.

III.

The refusal of the Railroad to provide a reasonable number of tank cars for the shipment of oil is a regulation or practice within the meaning of section 15 of the act to regulate commerce.

It is said, however, that even though Congress may have intended to confer upon the Interstate Commerce Commission the power to make an order to require a carrier to *provide and furnish* cars, the power to make such an order is not conferred by section 15 of the act, and that the only remedy for the enforcement of such an order would be a civil proceeding, since the penalty prescribed by section 16 of the act for failing to obey an order of the Commission applies only to orders made under section 15.

The contention is that section 15 does not authorize the Commission to make such an order as that which is here attacked; that the only kind of an order which the Commission is authorized by that section to make is an order requiring a carrier to cease and desist from the charging of an unreasonable or discriminatory rate, or from an unreasonable or discriminatory regulation, practice, or classification; and that the thing from which petitioner is required to cease and desist is not a regulation, practice, or classification or the charging of an unreasonable rate.

The Standard Dictionary defines the word "practice" thus: "Any customary action or proceeding re-

garded as individual; habit;" "an established custom; a prescribed usage;" "the act or process of executing or accomplishing; the use of means to attain an end; doing or performance, as distinguished from theory, conception, or conjecture."

In regularly refusing to assume any obligation to furnish tank cars, the Railroad makes a *practice* of not furnishing such cars. This is evident from the announcement in its published tariffs that it *does not assume any obligation* to furnish tank cars.

Moreover, there is no allegation in the petition that the Railroad's refusal to furnish tank cars upon reasonable request is not a regulation or practice, and no allegation that the finding of the Commission that the Railroad does make a practice of refusing to provide and furnish a sufficient number of tank cars for the normal shipments of complainants is not supported by substantial evidence.

The fourth paragraph of section 1 of the act makes it the duty of common carriers—

to establish, observe, and enforce * * * just and reasonable regulations and practices affecting * * * facilities for transportation * * * and all other [related] matters * * * which may be necessary or proper to secure the safe and prompt * * * transportation * * * of property * * * upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice * * * is prohibited and declared to be unlawful.

Under the definition in the second paragraph of section 1 the term "transportation" as heretofore noted is made to include—

cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof * * *.

The practice from which the Railroad is required to cease and desist is the refusal to provide and furnish upon reasonable request tank cars for the shipment of petroleum products.

The case of the *Atchison, T. & S. F. Ry. Co. v. U. S.*, 232 U. S., 199, involved what is admitted to be a practice within the scope of section 15. In that case the practice was the icing of cars. There is no distinction in principle between furnishing of refrigeration for the transportation of fruit and the furnishing of tank cars for the transportation of petroleum products.

IV.

The order of the Commission is not void for uncertainty.

The order requires the carrier on or before a certain date to provide tank cars sufficient to move the *normal shipments* of complainants, and *thereafter* to furnish such cars upon reasonable request.

The order follows the language of the act. The Commission has found that the volume of complainants' shipments in the past has been such as to justify the demands for equipment made by

complainants. The Commission thus finds that complainants have already made a reasonable request of the Railroad to "provide" tank cars, and the cars which are to be provided under the order are to be furnished upon reasonable request. The requirement to furnish cars sufficient for the "normal shipments" of complainants is as definite as the order could have been made, and the Commission has pointed out in the report what this means. "Normal shipments" are in effect defined to be those which are reasonably to be anticipated in the light of past demands. *Until the Railroad has made some effort to comply it can not complain that the order is not more definite.*

The Railroad has not attempted to provide tank cars for the normal shipments of complainants because it has declined to recognize its obligation to do so; but if this court should decide that the obligation exists, it must be presumed, until the contrary appears, that no dispute will arise as to the number of cars required, since it does not appear that as to cars which the Railroad recognizes its obligation to furnish any such dispute has ever arisen. The object of the proceeding in which the order was made was to establish the duty of the Railroad to provide tank cars, and the only issue here is whether or not the Commission had jurisdiction to make that order. If a controversy should hereafter arise as to the *number* of cars required for the normal shipments of complainants that proposition can then be considered.

V.

A railroad may be required to furnish cars for shipments to points on other lines of railroad.

The order makes no distinction between requests for cars to carry shipments consigned to points on the line of the Pennsylvania Railroad and requests for cars to carry shipments consigned to points on other lines of railroad, and this it is claimed renders the order void. Section 1 of the act, however, requires carriers to establish through routes and to provide reasonable facilities for operating such through routes. The order must be interpreted in the light of what the Commission has said as to the obligation of carriers under this provision. Record, page 32:

The responsibility to the shipper of furnishing a proper supply of cars rests upon the road upon which the shipper is located and the traffic originates. *Campbell's Creek Coal Co. v. A. A. R. R. Co.*, 33 I. C. C., 558, 562; *Coal Rates on the Stony Fork Branch*, 26 I. C. C., 168, 174. The originating line as between it and its connections does not necessarily rest under the burden of supplying all the cars which may be required for transportation over through routes and under joint rates, but in the case of through routes composed of two or more carriers the obligation to furnish cars for transportation over such through routes is joint upon the carriers therein. *Huerfano Coal Co. v. C. & S. E. R. R.*, 28 I. C. C., 502, 506; *Lumber Rates*

through Ohio River Crossings, 29 I. C. C., 38, 39; *Pittsburgh & S. W. Coal Co. v. W. P. T. Ry. Co.*, 31 I. C. C., 660, 663.

The mere fact that the Railroad may be compelled under the order to permit its cars to leave its line does not invalidate the order. *Mich. Cent. R. R. v. Michigan R. R. Comm.*, 236 U. S., 615.

VI.

The order does not require the Railroad to seize all tank cars on its lines regardless of ownership or right of control.

The charge made in paragraph 14 of the petition that the Railroad is required by the order to furnish to complainants upon request all cars which happen to be on its line regardless of ownership is hardly to be taken seriously. The requirement of the act that the company must "provide and furnish" cars upon reasonable request cannot be distorted into a command to *seize* cars on its line regardless of ownership. The Commission states in its report, which is made a part of the order, that the Railroad may lease tank cars from the independent car lines, and there is no allegation in the petition that the independent car lines have refused to lease such cars to the Railroad. The order can be complied with in a lawful way and cars for shippers can be provided and furnished without resorting to illegal methods.

VII.

The order is not void by reason of the fact that it does not give a longer time for compliance.

After the petition was filed, the effective date of the order was extended to November 15, 1915, and there was no allegation that the additional time given for compliance was not sufficient. The Railroad, however, does not state how much time would be required for compliance, or that it has made any effort to comply. Until the Railroad has made an effort to comply, or at least shown to the Commission the time which would reasonably be required for compliance, and has been denied further time by the Commission, it is not in a position to ask that the order be declared void because more time was not given.

CONCLUSION.

The purpose of the act is plain. The wisdom of its policy was for Congress to determine and can be questioned neither by the Commission nor by the courts. It is inconceivable that Congress should have intended that the refusal of a carrier to furnish cars upon a reasonable request therefor, as provided in the act, should be justified by the mere failure of the carrier to *provide* such cars as may have been found by experience to be reasonably necessary for the transportation of the normal traffic of which it holds itself out as a common carrier. Clearly, moreover, Congress must have intended that the Commis-

sion charged with the duty of executing all the provisions of the act should have the power to determine the administrative questions here involved. We therefore ask that the judgment appealed from be reversed.

Respectfully submitted.

JOSEPH W. FOLK,

Counsel for the Interstate Commerce Commission.



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In the Supreme Court of the United States

October Term, 1916,

~~1916~~ **No341**

THE UNITED STATES, INTERSTATE COMMERCE
COMMISSION, and THE CREW-LEVICK
COMPANY,
Appellants,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Appellee.

BRIEF FOR THE CREW-LEVICK COMPANY.

On Appeal from the District Court of the United States
for the Western District of Pennsylvania.

CHARLES D. CHAMBERLIN and
DAVID WALLERSTEIN,
Counsel for The Crew-Levick Company.

In the Supreme Court of the United States

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No. 791.

THE UNITED STATES, INTERSTATE COMMERCE
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In the Supreme Court of the United States

October Term, 1915.

No. 791.

THE UNITED STATES, INTERSTATE COMMERCE
COMMISSION, and THE CREW-LEVICK
COMPANY,
Appellants,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Appellee.

BRIEF FOR THE CREW-LEVICK COMPANY.

On Appeal from the District Court of the United States
for the Western District of Pennsylvania.

STATEMENT.

The Pennsylvania Paraffine Works, of Titusville, Pa., a corporation to which The Crew-Levick Company, appellant herein, is successor, on or about February 20th, 1913, filed a complaint before the Interstate Commerce Commission, against The Pennsylvania Railroad Company, alleging that it was, and for a number of years had been, engaged in the refining of petroleum, and shipped from its refinery at Titusville, Pa., about 450,000 gallons of said product per month to various points in interstate commerce; that The Pennsylvania Railroad Company was a common carrier subject to

the Act to Regulate Commerce (Rec., p. 7); that The Pennsylvania Paraffine Works had ample sidings and switches connected with the tracks of the Pennsylvania Railroad to receive, and facilities for loading and unloading, tank cars of petroleum and its products, and sufficient tanks in which to store such oils; that the lines of The Pennsylvania Railroad Company were best situated to receive and transport to destination The Pennsylvania Paraffine Works' shipments of oil; that The Pennsylvania Paraffine Works owned 50 tank cars, and requested and served notice in writing upon the officers of The Pennsylvania Railroad Company to furnish enough more tank cars to enable it to ship 450,000 gallons of oil and gasoline per month, on November 11th, 1912 (Rec., pp. 8-9); that The Pennsylvania Railroad Company, by its General Manager, replied, "We beg to say that the Railroad Company is not prepared to increase its tank car equipment, but is prepared to transport the commodities in question when properly contained in barrels, or other similar containers, at rates that are fair and reasonable and non-discriminatory."

Said complaint further alleged that The Pennsylvania Railroad Company had held itself out as willing to transport petroleum oils in bulk, and had so transported them for over twenty-five years; that the cost of transporting oils in barrels and similar containers was 25% more than in bulk, by reason of the weight of the container, and the cost of the package added 25% to the cost of the contents (Rec., p. 10); that The Pennsylvania Railroad owned about 500 tank cars, which were wholly inadequate to transport the oil in bulk offered to it for transportation, so that shippers of petroleum and its products were obliged to own and furnish tank cars which were necessary for the transportation in bulk, and that transportation in barrels would greatly increase the cost of such products to the public; that it was the duty

of The Pennsylvania Railroad Company to furnish such tank cars, and that The Pennsylvania Paraffine Works required upwards of 100 tank cars per month to transport its oils (Rec., p. 11); that The Pennsylvania Railroad Company, although often requested to furnish such tank cars, had neglected and refused to do so (Rec., p. 12).

The prayer of the complaint asked that The Pennsylvania Railroad Company be required to furnish the necessary tank cars, in conformity with the provisions of the Act to Regulate Commerce. (Rec., p. 14.)

The answer of The Pennsylvania Railroad Company admitted all of the averments of the complaint, except that it denied that it wholly failed, neglected and refused to furnish cars to complainant to ship its products in bulk, and denied that it had violated any of its obligations or the provisions of the Act to Regulate Commerce. The Pennsylvania Railroad Company refers to its publication in the Official Classification, in part, as follows: "In providing ratings in this classification for articles in tank cars, the carriers whose tariffs are covered by this classification do not assume any obligation to furnish tank cars." (Rec., p. 17.)

The Interstate Commerce Commission, after hearing evidence on the matter offered by complainant and defendant, and briefs and arguments by counsel, on May 11th, 1915, made its report and order. (Rec., pp. 18-35.) The order entered is as follows:

"It is ordered, That the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist, on or before August 15, 1915, and thereafter to abstain, from refusing upon reasonable request and reasonable notice therefor to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the Act to Regulate Commerce and amendments thereto.

“It is further ordered, That said defendant be, and it is hereby, notified and required to provide, on or before August 15, 1915, and thereafter to furnish, upon reasonable request and reasonable notice, at complainants’ respective refineries, tank cars in sufficient number to transport said complainants’ normal shipments in interstate commerce.

“And it is further ordered, That this order shall continue in force for a period of not less than two years from the date when it shall take effect.”

On June 3rd, 1915, The Pennsylvania Railroad Company filed a petition in the District Court of the United States for the Western District of Pennsylvania, against the United States, in which, aside from formal allegations, after reciting the order entered by the Interstate Commerce Commission, it averred that neither the Act to Regulate Commerce, or any other law, imposes on complainant the obligation to supply tank cars for the transportation of petroleum, and that the order entered by the Interstate Commerce Commission in the aforesaid proceedings is without lawful warrant; that neither the Act to Regulate Commerce, nor any other law, confers upon the Interstate Commerce Commission the authority to make the order aforesaid; that neither the Act to Regulate Commerce, nor any other law authorized the Interstate Commerce Commission in a proceeding of the character heretofore referred to in the petition as pending before it between The Pennsylvania Paraffine Works and the Pennsylvania Railroad Company to make the order referred to; that the order of the Interstate Commerce Commission entered in the proceedings heretofore referred to assumes to require the Pennsylvania Railroad Company to furnish to the Pennsylvania Paraffine Works tank cars for the through transportation of shipments of petroleum in interstate commerce, not only when consigned to points on the line of railroad of this company, but also when consigned to points on the lines of rail-

road of other railroad companies, and that the said order in this regard is without lawful warrant and contrary to the Fifth Amendment of the Constitution of the United States.

That the order aforesaid assumes to require the Pennsylvania Railroad Company to furnish The Pennsylvania Paraffine Works tank cars for the through transportation of petroleum in interstate commerce when such cars happen to be on the railroad of complainant whether or not such tank cars are owned by complainant or by other railroad companies or by private individuals and that the said order is in this regard without lawful warrant and is contrary to the provisions of the Act to Regulate Commerce; and that obedience thereto would subject complainant to actions for damages on the part of the owners of such tank cars and to liability in such actions and that the order is unlawful and contrary to the provisions of the Fifth Amendment to the Constitution of the United States; that the said order deprives complainant of its property without due process of law in this, that the time allowed for compliance with the order is insufficient to enable complainant to build tank cars and to permit it to arrange to acquire such cars or to obtain the use of them from present owners on reasonable terms, since such owners are under no compulsion to sell or rent them to this complainant upon just or reasonable terms; that the order in this regard is without lawful warrant and in violation of the Fifth Amendment of the Constitution of the United States; that the order aforesaid is uncertain and indefinite and without warrant in law.

That the order aforesaid will, unless enjoined, set aside, annulled and suspended, subject complainant to a multiplicity of suits for the enforcement of the said order under the provisions of the said act and will produce irreparable damage to complainant; that if complainant

should be compelled to comply with said order even temporarily pending final adjudication, complainant would be without means of reparation for the loss it would unlawfully sustain.

The Pennsylvania Railroad Company asks that a preliminary order or injunction be entered restraining and suspending the order of the Interstate Commerce Commission until final determination and that upon final hearing a decree be entered enjoining, setting aside, annulling and suspending the said order of the Interstate Commerce Commission and enjoining the enforcement of the said order. (Rec., pp. 2 to 6.)

A copy of said petition was duly served upon the Attorney General, whereupon on August 2nd, 1915, Defendant, The United States, filed a motion in the District Court below, to dismiss the petition for the reasons stated therein. (Rec., p. 37.) On September 16th, 1915, the Interstate Commerce Commission entered its appearance and The Crew-Levick Company filed its petition to be allowed to intervene, which was granted, and an order entered making The Crew-Levick Company a party defendant, whereupon it filed an answer. (Rec., p. 38.) The answer filed by The Crew-Levick Company is in substantial accord with the motion of the United States to dismiss the petition.

The cause was submitted before the Honorable Whooley, Circuit Judge, and Orr and Thompson, District Judges, an opinion filed November 9th, 1915, the first two judges concurring, the latter filing a dissenting opinion (Rec., pp. 46 to 58), and on November 13th, 1915, an interlocutory decree was entered overruling the motion to dismiss the petition and enjoining, annulling and suspending the order of the Interstate Commerce Commission. (Rec., p. 58.) On December 7th, 1915, Defendant, The United States, and intervening defendants, The Inter-

state Commerce Commission and Crew-Levick Company, joined in a petition for appeal with the following assignment of errors:

"The District Court erred:

I.

In overruling the motion of the United States to dismiss the petition on the various grounds set forth in the said motion, and in not sustaining the said motion.

II.

In overruling the motion of the Interstate Commerce Commission to dismiss the petition on the various grounds set forth in the said motion, and in not sustaining the said motion.

III.

In granting the interlocutory injunction enjoining the order of the Interstate Commerce Commission entered May 11, 1915, on complaint of Pennsylvania Paraffine Works v. Pennsylvania Railroad Company, No. 5574, and the Crew-Levick Company v. Pennsylvania Railroad Company, No. 5574 (Sub. No. 1), and suspending the force and effect of the same, for that the petition of the complainant (a) does not set forth any cause of action and is insufficient to warrant the granting of the interlocutory injunction or to form the basis for any relief from the said order; (b) nor has the complainant shown that there is any equity in the said petition on which to grant the interlocutory injunction or to form the basis for any relief from the said order; (c) nor has the complainant shown that in making its said order the Interstate Commerce Commission acted beyond or without its jurisdiction or exceeded any power or authority conferred on it by the act to regulate commerce; (d) nor has the complainant shown that in making its said order the Interstate Commerce Commission violated any right of the said complainant protected by the Constitution of the United States or any other right of the said complainant over which this court may exercise jurisdiction.

IV.

In holding and adjudging that the Interstate Commerce Commission was and is without power and authority to enter the order in the case of Pennsylvania Paraffine Works v. Pennsylvania Railroad Co., No. 5574, and the Crew-Levick Co. v. Pennsylvania Railroad Co., No. 5574 (Sub. No. 1), entered at a general session of the Interstate Commerce Commission at its office in Washington on the 11th day of May, A. D. 1915.

V.

In entering the following decree:

‘That the application of the complainant for an interlocutory injunction be, and the same is hereby, granted, as prayed in the petition, and that an interlocutory injunction be, and the same is hereby, issued out of this court, enjoining, annulling and suspending the order of the Interstate Commerce Commission in the case of Pennsylvania Paraffine Works v. Pennsylvania Railroad Company, No. 5574, and the Crew-Levick Company v. Pennsylvania Railroad Company, No. 5574 (Sub. No. 1), entered at a general session of the Interstate Commerce Commission at its office in Washington, D. C., on the 11th day of May, A. D. 1915, and that the said defendants and each of them, their officers, members, examiners, agents, and attorneys, and any and all persons whomsoever, be enjoined and restrained from enforcing, or in any manner attempting to enforce or carry out, the said order or the terms thereof until the further order of the court.’

VI.

In finding and deciding as follows:

‘We find nothing in the original or amended act which, by express language, imposes upon a carrier the extraordinary duty or confers upon the Interstate Commerce Commission the extraordinary power claimed by the Government in this proceeding. If they exist, they can be found only by implication, and it is doubtful if Congress would leave to implication an intention to impose so onerous a duty and to grant so great a power.’

VII.

In finding and deciding as follows:

'The carrier's duty to provide and furnish facilities of transportation is not absolute. The duty is laid upon them "according to their respective powers."

'Such expressions rather raise the implication that Congress did not intend to place an absolute and unqualified duty upon carriers to furnish cars of a certain type whether they had them or not, and if they did not have them then to acquire them whether they had the money or not. Restricting our construction of the act to its words, and finding nothing by implication that changes or qualifies their meaning, we are of the opinion that the amendment of 1906, including cars within the definition of "transportation", added nothing to the original duty of the carrier as prescribed by the original act and as interpreted by the Commission and vested in the Commission no increase of power over cars as instrumentalities of shipment. If, under the act as amended, no different or greater duty is imposed upon a carrier with respect to furnishing and providing cars than was prescribed by the original act, then the practice of the carrier found unlawful in this case was not in violation of the statute, and the order of the commission directing the carrier to desist from that practice was an exercise of power not conferred by law.' '

VIII.

In finding and deciding as follows:

'We find nothing in the law which confers upon the commission power to compel a carrier to acquire facilities it does not possess or to acquire better facilities than those it possesses, not with the object of preventing discrimination and preferences, but in order that the shipper may have larger, better, and perhaps more economical facilities. We are of opinion that in making the order the Interstate Commerce Commission exceeded its statutory power, and that the order should be suspended and annulled in accordance with the prayer of the petition.'

IX.

In finding and deciding that:

'In none of them (cases subsequently cited in the opinion) was the question raised or decided nor in any did the Supreme Court reveal its opinion as to whether there devolved upon a carrier a statutory duty to provide and furnish transportation of a type it did not possess, or to acquire such transportation in order to provide and furnish the same upon reasonable request.'

X.

In not finding and deciding that it is plainly the duty of the carrier not only to furnish cars on reasonable request, but to furnish cars reasonably suitable for the proper transportation of the freight to be shipped.

XI.

In not denying the application for interlocutory injunction and dismissing the petition.

Wherefore, defendants, and each of them, pray that the said interlocutory order or decree of the district court, entered November 13, 1915, be reversed, annulled and set aside, with direction that the petition be dismissed, and for such other and further order as may be appropriate."

An order was entered allowing the appeal to the Supreme Court of the United States from the interlocutory decree, and thereupon the entire record was submitted.

POINTS IN ARGUMENT.

1. The petition of complainant below was without equity on its face.
2. The Interstate Commerce Commission did not transcend its power in making the order enjoined.
3. The order enjoined was made in a proper proceeding and supported by substantial evidence.
4. The Interstate Commerce Commission was the sole judge of the weight of evidence and the wisdom of the order.
5. The court cannot substitute its own judgment for that of the Interstate Commerce Commission.
6. The act to regulate commerce imposes upon the carrier the duty to provide and furnish a type of car suitable for the transportation in which it is engaged upon reasonable request.
7. The amended act to regulate commerce imposes the duty upon carriers and confers the power upon the Interstate Commerce Commission claimed by the government in this proceeding.
8. The common law imposes the duty upon carriers to furnish cars suitable for the transportation in which they are engaged.

POINT I.

THE PETITION OF COMPLAINANT BELOW WAS WITHOUT EQUITY ON ITS FACE.

(a) Complainant had not, as appears upon the record and upon the face of the petition itself, exhausted its remedies at law.

Section 267 of the Judicial Code is an elementary provision.

“Suits in equity shall not be sustained in any court of the United States in any case, when a plain, adequate and complete remedy may be had at law.”

Section 16-a of the act to regulate commerce (amendment of 1906) provides the opportunity for a rehearing by any party to a proceeding before it, and “if in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, may reverse, change or modify the same accordingly.”

L. & N. R. R. Co. vs. U. S., 218 Fed., 89.

Atlantic Coast Line Railroad Co. vs. Macon Gro. Co., 166 Fed., 206.

No request of record is shown to have been made by complainant below of the Interstate Commerce Commission under Section 16 to extend the effective date of or to modify its order.

(b) The presumption that the order of the Interstate Commerce Commission was valid and regular was not overcome by any allegations in the petition.

Smith vs. St. L. & S. W. R. Co., 181 U. S., 248, 21 Sup. Ct. R. 603, 45 L. Ed., 847.

Railroad Com. vs. Cumberland Telephone & Tel. Co., 212 U. S., 414, 29 Sup. Ct. R. 357, 53 L. Ed., 577.

In the first of the above cases the court say:

"But the presumptions of the law are proof, and such presumptions exist in the pending case, arising from the provisions of and the duties enjoined by the statute, and sanction the action of the sanitary commission and the governor of the state. If they could have been, they should have been met and overcome."

In the second case the railroad commission of Louisiana had reduced appellee's rates, and asked and had been granted a rehearing but no further evidence had been offered by the respondent before the commission, which thereupon affirmed its former order. An injunction against the order had been allowed by the United States Circuit Court for the Eastern District of Louisiana and appeal taken to the Supreme Court of the United States, which said:

"The presumption in favor of the correctness of telephone rates established by a state commission obtains, although the data upon which the commission acted may have been insufficient, so long as the rates adopted were not based entirely upon arbitrary conjecture."

"A bill seeking to enjoin, as confiscatory and unreasonable, the enforcement of telephone rates established by a state commission, will not be dismissed, even without prejudice, on reversing the decree below, granting an injunction, because of complainant's failure to show the disposition of its so-called depreciation fund, but the cause will be remanded for a new trial, where the inquiry has been founded upon the actual effect of rates higher than those in question, and hence it is not merely conjecture as to what will be the result of lower rates."

Nothing specific was shown in the petition of complainant below and the opinion of counsel was not enough to overthrow the presumption that the order was valid. The petition admitted in terms by the exhibits attached and made a part of it that it owned and furnished tank cars and published rates for the transportation of oil in

bulk, which was the usual way the greater part of such commodities were transported, which transportation, instrumentalities, facilities and practices the Act to Regulate Commerce gave the Interstate Commerce Commission authority to regulate, and imposed the duty upon the carrier to provide and furnish (Act to Regulate Commerce, Sec. 1, par. 2; Sec. 3, par. 2); that such tank cars so furnished were to be used for shipments to points on other lines than those of complainant company was not different than its present practice and in obedience to the Act to Regulate Commerce (Act to Regulate Commerce, Secs. 1 and 7).

The petition showed upon its face that the order did not require the complainant below to confiscate to its own use in order to furnish tank cars to the Pennsylvania Paraffine Works cars belonging to others so that it would thereby be subjected to a multiplicity of suits and suffer great and irreparable damage, nor have its property taken without due process of law, or without just compensation. Complainant below was not, by the terms of the order complained of and recited in its petition, required to build tank cars to comply with said order although the Interstate Commerce Commission had that power under the Act to Regulate Commerce. Therefore, the order was not, in that respect, unlawful nor did it deprive complainant of its property without due process of law, nor was the time allowed insufficient in which to build or acquire said tank cars to comply with said order, nor does it appear upon said petition that any request had been made by complainant of the Interstate Commerce Commission for a suspension of the effective date of said order as provided in Section 16 of said Act to Regulate Commerce.

The answer of the Interstate Commerce Commission and the Crew-Levick Company, intervening defendants, showed, however, that the effective date of said

order had, by order of the Interstate Commerce Commission, been extended to November 15, 1915. There is nothing indefinite or uncertain in the order as appears upon its face. There is nothing required of complainant below by said order of the Interstate Commerce Commission that will produce any damage to said complainant and no specification appears on the face of said petition wherein such alleged damage or loss might arise. As nothing appears upon the face of the petition to overthrow the presumption that the said order was valid and regular, said petition was without equity and should have been dismissed. *Proctor & Gamble Co. vs. United States, et al.*, 225 U. S., 282, 56 L. Ed. 1091.

Baltimore & Ohio R. R. Co. vs. Pitcairn Coal Co.,
215 U. S., 481, 54 L. Ed. 292, 30 Sup. Ct., 164.

Pennsylvania Co. vs. United States, 236 U. S., 351,
59 L. Ed., 616.

Interstate Commerce Commission vs. Union Pacific Ry. Co., 222 U. S., 541, 56 L. Ed., 308,
32 Sup. Ct., 108.

POINT 2.

THE INTERSTATE COMMERCE COMMISSION DID NOT TRANSCEND ITS POWER IN MAKING THE ORDER ENJOINED.

Section 15 of the Act to Regulate Commerce provides:

"That whenever, after full hearing upon a complaint made as provided in Section 13 of this Act * * * the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier * * * as defined in the 1st section of this Act, or that any individual or joint classifications, regulations or **practices whatsoever** of such carrier or carriers, subject to the provisions of this Act are * * * unduly preferential or **prejudicial** or otherwise in violation of any of the provisions of this Act the Commission is hereby authorized and empowered to determine and prescribe what * * * **regulation or practice** is just, fair and reasonable, to be thereafter followed, etc."

Section 12. "* * * and the Commission is hereby authorized and required to execute and enforce the provisions of this Act * * *."

This Court in *Texas & Pacific Railroad Co. vs. I. C. C.*, 162 U. S., 197, 40 L. Ed. 940, said:

"The significance of this language (the latter part of Section 1 of the Act) in thus extending the judgment of the tribunal established to enforce the provisions of the Act to the entire service to be performed by carriers is obvious."

Cin. Hamilton & Dayton Ry. Co. vs. I. C. C., 206 U. S., 142, 51 L. Ed. 995, 27 Sup. Ct. 648.

Penn Refg. Co. vs. W. N. Y. & P. R. Co., 208 U. S., 208, 52 L. Ed. 456, 28 Sup. Ct., 268.

Interstate Commerce Commission vs. Stickney, 215 U. S., 98, 54 L. Ed. 112, 30 Sup. Ct., 66.

Union Pac. Ry. Co. vs. Updike Grain Co., 222 U. S., 215, 56 L. Ed. 171, 32 Sup. Ct., 39.

Sou. Pac. Term. Co. vs. I. C. C., 219 U. S., 498, 55 L. Ed. 310, 31 Sup. Ct. 279.

- Interstate Commerce Commission vs. Ill. Cent.
R. Co., 215 U. S., 452, 54 L. Ed. 280, 30 Sup.
Ct., 155.
- B. & O. R. Co. vs. Pitcairn Coal Co., 215 U. S., 481,
54 L. Ed., 292, 30 Sup. Ct., 292.
- Robinson vs. B. & O. R. Co., 222 U. S., 506, 56 L.
Ed. 288, 32 Sup. Ct., 114.
- Morrisdale Coal Co. vs. P. R. Co., 230 U. S., 304,
57 L. Ed. 1494, 33 Sup. Ct., 938.
- Mitchell Coal Co. vs. P. R. Co., 230 U. S., 247, 57
L. Ed., 1472, 33 Sup. Ct., 916.
- Interstate Commerce Commission vs. B. & O. R.
Co., 225 U. S., 326, 56 L. Ed., 1107, 32 Sup.
Ct., 742.
- N. Y., N. H. & H. R. Co. vs. Interstate Commerce
Commission, 200 U. S., 361, 50 L. Ed., 515, 26
Sup. Ct., 272.
- Montgomery vs. C. B. & Q. R. R. Co., 228 Fed., 616,
619, 621.

POINT 3.

THE ORDER ENJOINED WAS MADE IN A PROPER PROCEEDING AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

The proceedings herein were begun by the filing of a formal complaint before the Interstate Commerce Commission under Section 13 of the Act to Regulate Commerce (Rec., pp. 7 to 14), and as required by the Act, the defendant therein, not having satisfied the complaint filed its answer (Rec., pp. 15 to 17) *ad seriatim* to the allegations contained in said complaint but did not in its said answer allege or point out any irregularity in form, substance or procedure as none existed. In its petition in the court below, plaintiff therein adds nothing to its prior position except that it is advised by counsel and therefore avers, that neither the Act to Regulate Commerce nor any other law authorized the Interstate Commerce Commission in a proceeding, of this character to make the order referred to in its petition. (Rec., p. 4.)

The Interstate Commerce Commission held a hearing as provided by Section 13 of the Act at which both parties, without any objections on the part of defendant therein, offered testimony (Rec., p. 3), and thereafter both parties before the Commission filed briefs and argued the cause and regularly submitted it to the Commission for decision. The Interstate Commerce Commission, after full investigation as required by Section 14 of the Act, made a report in writing in respect thereto, stating its conclusions, together with its decision and order, (Rec., pp. 18 to 36), and as authorized by Section 15 of the Act, found what regulation or practice was just, fair and reasonable to be thereafter followed, and made an order that the defendant carrier should cease and desist

from such violation to the extent which the Commission found the same to exist and to conform to and observe the regulation or practice so prescribed. The entire proceeding was in full compliance with the Act to Regulate Commerce, the whole scope of which has been repeatedly held by this Court to be administrative and that the Interstate Commerce Commission and not the courts should pass upon administrative questions.

- T. & P. R. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426, 51 L. Ed. 553, 27 Sup. Ct., 350.
- B. & O. R. Co. vs. Pitcairn Coal Co., 215 U. S., 481, 54 L. Ed. 292, 30 Sup. Ct., 292.
- Robinson vs. B. & O. R. R. Co., 222 U. S., 506, 56 L. Ed., 288, 32 Sup. Ct., 114.
- United States vs. Pac. & Arc. Co., 228 U. S., 87, 57 L. Ed., 742, 33 Sup. Ct., 443.
- Penna. R. Co. vs. International Milling Co., 230 U. S., 184, 57 L. Ed., 1446, 33 Sup. Ct., 893.
- Mitchell Coal & Coke Co. vs. P. R. R. Co., 230 U. S., 247, 57 L. Ed., 1472, 33 Sup. Ct., 916.
- Morrisdale Coal Co. vs. P. R. R. Co., 230 U. S., 304, 57 L. Ed., 1494, 33 Sup. Ct., 938.
- Sou. Ry. Co. vs. Reid, 222 U. S., 424, 56 L. Ed., 257, 32 Sup. Ct., 140.
- Vulcan Coal & Mining Co. vs. Ill. Cent. R. Co., 33 I. C. C., 52.
- United States vs. Louisville & N. R. Co., 195 Fed., 88.

Plaintiff in the court below made no claim that the order was not made upon substantial and competent evidence.

POINT 4.

THE INTERSTATE COMMERCE COMMISSION WAS THE SOLE JUDGE OF THE WEIGHT OF EVIDENCE AND THE WISDOM OF THE ORDER.

From the evidence in the record before it, the Interstate Commerce Commission found that complainants in the proceeding were engaged at Titusville and Warren, Pennsylvania, in refining crude petroleum and had been for over twenty years; found the amount so refined by them, of which amount 91 percent was and had been shipped in tank cars; approximately 250 million barrels of crude oil was produced in the United States in 1914, 91 percent of the refined oil from that amount of crude was shipped in tank cars; complainants and dealers to whom they shipped had ample facilities for loading and unloading tank cars; the only other method of shipping oil was in barrels or similar containers at an added cost of $3\frac{1}{2}$ cents per gallon for the container and extra labor and 25% added cost of freight transportation which was prohibitive. Even witnesses for defendant admitted that tank cars are an absolute necessity for the transportation of refined products and that their use effected an economic gain; that revenue from their use compared favorably with revenue derived from movements in other cars and the transportation of oil in tank cars was desirable from a purely transportation standpoint.

The Pennsylvania Railroad Company, in 1887, acquired over 1300 tank cars and still owns 499,482 of which were furnished by it to shippers upon its line. The total number of tank cars in the United States was approximately 40,000. The complainants before the Interstate Commerce Commission owned a few tank cars, but not enough to meet their demands and request was made by them of the Pennsylvania Railroad Company to furnish a sufficient number to transport their requirements. The

request was refused. The Commission from the facts found it must decide not whether the tank cars supplied by defendant, together with those of complainants are sufficient to meet complainants' demands, but whether complainants may retire from the business of furnishing tank cars for the transportation of oil and thenceforth rely entirely upon railroads to provide this equipment. The question of the jurisdiction of the Interstate Commerce Commission over the controversy is then disposed of by referring to the provisions of the Act as amended, as interpreted by decisions of the courts and its own construction of the Act.

The Interstate Commerce Commission then turns to the contention of defendants that even if the Act should be held to invest the Commission with power to require carriers to purchase additional tank cars, the evidence in the case does not justify the Commission in exercising the power for the alleged reason that the circumstances attending the transportation of commodities in tank cars are so peculiar as to constitute them a class of equipment which should be furnished by shippers; that while the volume of petroleum shipments is greater than the volume of all other liquid commodities transported in tank cars, there are various other liquid commodities, some 44 enumerated some of which require tank cars of peculiar construction; the carrier would be under the necessity of acquainting its employees with all the possible difficulties and dangers of all liquid commodities transported. Even tank cars devoted to the petroleum trade must be divided into classes and their use restricted to refined, light and heavy lubricating oil classes. The demand for tank cars amounts in substance to a demand not only for the vehicle, but also for the package, and relieves the shippers of the expense of packing, which they may properly be called to bear.

Finally, that the Pennsylvania Railroad Company owns more tank cars than all other carriers east of the

Mississippi river and if other lines would furnish tank cars in equal proportions the supply would be sufficient to meet all demands; that complainants' requests would practically require the Pennsylvania Railroad Company to furnish equipment available for all railroads in such territory.

The Commission disposes of defendant's objections by concluding that for the shipment of some products it would not be reasonable to require carriers to furnish tank cars, but this would not be the case in the movement of petroleum. The record does not show that technical knowledge is needed in the shipment of petroleum products in tank cars as to render unreasonable complainants' request to furnish them. **The fact that defendant, for more than twenty years past, has been furnishing them bears witness to the contrary.** There is no hardship to defendant arising out of allowing its equipment to move beyond its lines; the necessity **for defendant to purchase** a large number of tank cars does not follow from the holding in this case. The requirement of the Act is to **provide and furnish,—not necessarily to buy,—**a reasonably adequate supply of cars, and the 13,000 or more tank cars owned by car line companies are available to defendant as well as shippers; moreover, all cars used by carriers whether they be owned by carriers themselves or leased from car line companies, or from shippers must be distributed without discrimination. This includes all cars secured from shippers for which carriers pay a compensation. At the same time, defendant will be under no obligation to accept for use any privately owned cars unless it chooses to do so. The responsibility to the shipper of furnishing a proper supply of cars rests upon the railroad upon which the shipper is located.

One of the tests which may be relied upon in determining the reasonableness of a shipper's request for cars

is to be found in the volume of his shipments in the past, due allowance being made for the growth of his business. Complainants have not only shown that the volume of their past shipments is such as to justify the demands for equipment which they have made, but also that the future volume will be as great as in the past. (Rec., pp. 18 to 36.)

All of the above shows that the Interstate Commerce Commission, in this proceeding, carefully weighed the evidence both pro and con of which they were the sole judge and their findings of fact in this case is conclusive upon the courts. Their order based upon their findings and conclusions is reasonable and sound, the wisdom of which may not be questioned by the courts.

In *Pennsylvania R. Co. vs. International Coal Mining Co.*, 230 U. S., 184, 57 L. Ed. 1446, 33 Sup. Ct. 893, this Court said:

"Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals."

B. & O. R. R. Co. vs. Pitcairn Coal Co., 215 U. S. 481, 54 L. Ed. 292, 30 Sup. Ct. 164.

Robinson vs. B. & O. R. Co., 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. 114.

Morrisdale Coal Co. vs. Penna. R. Co., 230 U. S. 304, 57 L. Ed. 1494, 33 Sup. Ct. 938.

Mitchell Coal Co. vs. Penna. R. Co., 230 U. S. 247, 57 L. Ed. 1472, 33 Sup. Ct. 916.

POINT 5.

THE COURT CANNOT SUBSTITUTE ITS OWN JUDGMENT FOR THAT OF THE INTERSTATE COMMERCE COMMISSION.

The majority opinion of the court below states the question to be decided in the following language:

"The question in this case in the abstract is whether the act to regulate commerce, as amended, imposes upon a carrier the duty to acquire and to provide and furnish transportation of a type that, **physically or economically**, is best adapted to the needs and uses of the shipper, of which the Interstate Commerce Commission is the judge. The precise question is whether the Interstate Commerce Commission has power to compel the Pennsylvania Railroad Company to **purchase** and acquire tank cars for the shipment of oil, and to provide the same to complaining shippers upon requests which the commission may adjudge reasonable." (Rec., p. 49.) (Black faced type ours.)

A little farther on in the opinion it is stated:

"Excerpts from several opinions of the Supreme Court were cited in support of the Government's contention that a railroad company, holding itself out as a carrier, is under a legal obligation, arising out of the fact of its employment, to provide transportation means and facilities commensurate with the demands of shippers, without regard to whether they possess them or have the money with which to acquire them." (Rec., p. 49.)

Again:

"* * * whether the power of the Interstate Commerce Commission to prevent undue preference and unjust discrimination in the use of a carrier's cars has been enlarged and expanded into a power to control the 'practices' of carriers, by determining and prescribing the type and character of 'all (their) instrumentalities and facilities of shipment or carriage,' in order to procure for the shipper a **better, safer, and more economic transportation service.**" (Rec., p. 50.)

Again:

"Such expressions rather raise the implication that Congress did not intend to place an absolute and unqualified duty upon carriers to furnish cars of a **certain type whether they had them or not**, and if they did not have them, then to acquire them, whether **they had the money or not**." (Rec., p. 53.)

And finally:

"The law clearly confers upon the commission power to so regulate the use of the facilities **pos-
sessed** by the carrier that there shall be no unjust discrimination, but we find nothing in the law which confers upon the commission power to compel a carrier to acquire facilities it does not possess or to **acquire better facilities than those it possesses**, not with the object of preventing discrimination and preferences, **but in order that the shipper may have larger, better, and, perhaps, more economical facilities**. We are of opinion that in making the order the Interstate Commerce Commission exceeded its statutory power and that the order should be suspended and annulled in accordance with the prayer of the petition." (Rec., p. 53.)

These are all conclusions of fact at variance with the conclusions of the Commission and furnish the basis for the judgment of the court below.

As opposed to the above conclusions, we excerpt pertinent findings from the opinion of the Commission found in the present record:

"Defendant states that so long as there is no unreasonableness or discrimination in the rates and so long as the carrier's equipment is adapted to the safe transportation of the goods intrusted to it, there is nothing in section 1 which in any way restricts the right of the carrier to choose and select the vehicle of transportation which it regards most satisfactory for the conduct of its business.

As bearing upon this point, it should first be stated that defendant **holds itself out to transport oil in bulk**. It not only publishes rates for the transportation of oil in tank cars, but owns tank cars and supplies shippers with them. It leases cars owned

by companies engaged in refining oil and transports their products in those cars at the rates it publishes for the movement by rail of oil in tank cars. It certainly cannot be contended that the transportation by rail of oil in bulk could be attempted safely in any equipment other than tank cars." (Rec., pp. 26-27.)

Again:

"One further argument advanced by defendant should be considered in connection with the question of jurisdiction. Defendant states that to require the carrier to purchase additional equipment may involve a demand that the carrier increase its capital account, and the power of the commission can only properly be determined by a consideration of its right to require such action on the part of the railroads. But such an objection is not sound, because the question of the financial ability of any carrier would be a matter for consideration in **judging of the reasonableness** of the request for special or additional equipment and would be one of the matters considered by the Commission in **judging the particular case when the same arises.**" (Rec., p. 31.)

And,

"While it must be recognized that for the shipment of some of the products which now move to a certain extent in tank cars it would not be reasonable to require carriers to furnish tank cars, we do not believe this to be the case in the movement of the products of petroleum. In many industries a few tank cars will suffice to move the products of the industry. In other cases the tank cars must be prepared for shipment in a manner which is peculiarly within the technical knowledge of the men connected with that industry, or the handling of the commodity is a dangerous operation which can be safely performed only by men engaged in its production. **In the latter case a shipper's request for cars peculiarly suited for the transportation of his products would not be a reasonable one,** and in such cases carriers should publish rates for the transportation of the privately owned tank car filled with these products and not, as in the case of oil, for the transportation of the product in tank cars. The railroad

would not then hold itself out to transport the commodity in any other way than in tank cars offered by the shipper, and **no obligation would rest upon it to furnish these cars.** In such cases the shipper should receive no rental for the use of the car.

The record does not show such technical knowledge to be needed in the shipment of petroleum products in tank cars as to render unreasonable complainants' request to furnish cars. The fact that the defendant has for more than 20 years past been furnishing tank cars for the shipment of oil bears witness to the contrary. We see no particular hardship to defendant arising out of the necessity of allowing its equipment to move beyond its lines. Further, the necessity of defendant's **purchasing** a large number of additional tank cars **does not follow from our holding in the present case.** The requirement of the act is that defendant provide and furnish—not necessarily buy—a reasonably adequate supply of cars, and the 13,000 and more tank cars owned by independent car lines are available to defendant as well as to shippers. Defendant's brief contains the suggestion that perhaps the solution will be to have private companies furnish cars of special types. **That is a solution of which the carriers can avail themselves if they so desire."** (Rec., pp. 32-33.)

Also:

"Carriers should lease cars only upon such terms as permit them to meet their obligation to furnish cars without discrimination. Under this ruling cars of complainants and of all other refiners upon defendant's line offered it for use at a compensation will become available to defendant for distribution among all shippers who may apply for them. At the same time defendant will be under no obligation to accept for use any privately owned cars unless it chooses to do so. *Atchison Ry. Co. v. U. S.*, 232 U. S., 199." (Rec., p. 33.)

Concluding as to the reasonableness of the demand:

"One of the tests which may be relied upon in determining the reasonableness of a shipper's request for cars is to be found in the volume of his shipments in the past, due allowance being made for the growth of his business. Complainants have

not only shown that the volume of their past shipments is such as to justify the demands for equipment which they have made but also have introduced evidence tending to show that in the future the volume of their business will be as great as in the past. Defendant will be required, upon reasonable request and reasonable notice, to furnish tank cars in sufficient number to move complainants' normal production. Defendant can not be required to furnish all the cars which may be demanded by complainants under extraordinary conditions arising from exceptional causes, which could not reasonably have been anticipated and which make it physically impossible to furnish all the cars desired." (Rec., pp. 34 and 35.)

If it were necessary to make this point clearer than by a comparison of the opinions quoted above, it would be made so by referring to the excellently reasoned and obviously sound dissenting opinion of Judge Thomson, who said:

"If, then, it is the duty of the carrier on reasonable request to furnish coal cars to the shipper of coal, stock cars to the shipper of live stock, fruit cars, with refrigeration, for the shipper of fruit, **on no principle could the oil shipper be denied cars reasonably suited for the shipment of oil.** The word 'reasonable', as used in the act, is a qualifying and saving term. Not merely the demands and needs of the shipper are to be considered but the circumstances of the carrier and the rights of the public as well. The fitness and efficiency of the transportation requested, whether the facilities of shipment would be made better and more economical, the public advantage to be derived therefrom, the cost and expense in relation to the benefit resulting, all the circumstances, time, and place, and means as affecting the carrier and its ability to supply the transportation demanded—these and all other relevant matters may be considered in determining the reasonableness of the shipper's demand. If the request be reasonable, it is the legal duty of the carrier to comply with it; if unreasonable, no such duty devolves upon the carrier. And **this question of fact,**

in case of dispute, the Commission must decide." Rec., p. 56.)

Also:

"We are not passing on some **abstract proposition** as to the power of the commission to order, without restraint, the equipment and furnishing of cars, without reference to conditions or circumstances. We are passing on a **concrete question based on specific facts, conclusively found by the commission**. It would be easy to imagine on the part of a shipper an unwarranted and unreasonable request and on the part of the carrier an arbitrary and unjust denial of a reasonable demand. The Interstate Commerce Commission is the tribunal standing between the parties, with power to hear and determine, and especially competent by reason of experience to determine with justness and uniformity of decision." (Rec., p. 57.)

Again:

"I cannot agree with the proposition that the duty imposed upon the carrier to furnish cars is limited to those which the carrier may have on hand, or that there is no obligation to acquire facilities it does not possess, or to acquire better facilities to meet the reasonable demands of the shippers. I base my conclusion on words of the act itself, 'it shall be the duty of every carrier subject to the provisions of this act, to provide and furnish such transportation on reasonable request therefor.' No words more specific or definite than 'provide and furnish' could have been chosen. I find no limitation of any kind in the act upon the duty thus imposed upon the carrier, except only that the request therefor be reasonable. There are no words from which it can fairly be assumed that existing ownership or control is a prerequisite to the carrier's duty to provide and furnish. From the explicit words of the act, it would seem to follow that if a reasonable request is made for cars and the carrier does not possess them, it must acquire them for use by one of the many methods for their acquisition. **If not, this most important provision of the statute would be rendered largely nugatory.** Perhaps the most effective blow which

Congress could deal at discrimination in interstate traffic is the duty imposed on the carrier to furnish transportation. There could be no more prolific source of discriminating practices than the right in the carrier to grant or withhold the means of transportation at its discretion. The demands of the favored shipper would be met by promptly acquiring and furnishing the transportation called for. We do not have what you demand, would be a conclusive answer to the less favored." (Rec., p. 57.)

C. H. & D. Ry. Co. vs. I. C. C., 206 U. S. 142, 51 L. Ed. 995, 29 Sup. Ct. 648.

POINT 6.

THE ACT TO REGULATE COMMERCE IMPOSES UPON THE CARRIER THE DUTY TO PROVIDE AND FURNISH A TYPE OF CAR SUITABLE FOR THE TRANSPORTATION IN WHICH IT IS ENGAGED UPON REASONABLE REQUEST.

Under this point it must be remembered that the record discloses the following facts; the total production of crude petroleum in the United States (1914) was upward of 250 million barrels; 91 per cent of the product was transported in tank cars; 40,000 tank cars were in use in the United States; 27,000 were privately owned; 13,000 were owned by car line companies, available for the use of carriers and shippers alike. The Pennsylvania Railroad Company owned 500 and had for more than 20 years furnished them for the transportation of petroleum; the revenue to carriers from the transportation of petroleum in tank cars compared favorably with other shipments in carloads; their use was advantageous from a transportation standpoint and was an economic gain to the public; they were the only means of transporting petroleum in bulk and admitted a necessity by defendants' witnesses before the Interstate Commerce Commission; carriers published rates, rules and regulations applicable to the transportation of petroleum in tank cars; they are instrumentalities of transportation; the complainants before the Commission had, upon reasonable notice, made a demand upon defendant to furnish them with a sufficient number of tank cars to transport their shipments; the Interstate Commerce Commission had found the above facts and made an order requiring defendant to cease and desist on or before August 15, 1915, and thereafter to abstain from refusing to provide and furnish tank cars to complainants for inter-

state shipments of petroleum and its products, which refusal had been found in its report to be in violation of the provisions of the Act to Regulate Commerce and amendments thereto, and to provide and furnish on or before August 15, 1915, and thereafter, upon reasonable request and reasonable notice at complainants' respective refineries, tank cars in sufficient number to transport complainants' normal shipments in interstate commerce. (Rec., 18 to 36.)

The Act to Regulate Commerce certainly, under these facts, imposes the duty upon the defendant to comply with this order.

In *Chicago Board of Trade vs. Chicago & Alton Railroad Co.*, 4 I. C. C. R., 158, 187, the Interstate Commerce Commission, in discussing the question of the claimed right of carriers to work a discrimination in the use of equipment for the transportation of live hogs because of the difference between single-deck and double-deck cars, said:

"Now it is one of the plain duties of the carrier to properly equip its road with all such cars as experience has shown to be necessary for the right movement of freight along its line, and in like manner to have depots and arrangements for the proper and necessary receipt and delivery of freight at stations along its line. A carrier is not warranted under the statute in setting up its own omission in these respects to justify an exceptional rate which unjustly discriminates against one locality in favor of all others and against one kind of traffic in favor of another."

In *Covington Stock-Yards Co. vs. Keith*, 139 U. S., 128, 133, 35 L. Ed., 73, 11 Sup. Ct., 461, the Supreme Court of the United States, speaking through Mr. Justice Harlan, said:

"The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and fa-

cilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in respect to such matters is, whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public."

In *Atchison Railway Co. vs. United States*, 232 U. S., 199, 217, 58 L. Ed., 568, 34 Sup. Ct., 291, the Supreme Court of the United States, in sustaining the order of the Interstate Commerce Commission speaking through Mr. Justice Lamar, said:

"Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay. The interest of the public is to be considered as well as that of shippers and carriers."

In *Ellis vs. Interstate Commerce Commission*, 237 U. S., 434, 59 L. Ed., 1036, decided May 10, 1915, the Supreme Court of the United States, speaking through Mr. Justice Holmes, said:

"The Armour Car Lines is a New Jersey corporation that owns, manufactures, and maintains refrigerator, **tank** and box cars, and that lets these cars to the railroad or to the shippers * * *. It is true that the definition of transportation in section 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request * * *."

See also to the same effect *United States vs. Union Stock Yards & Transit Co.*, 226 U. S., 286, 303, 57 L. Ed. 226, 33 Sup. Ct., 83; *Pennsylvania Co. vs. United States*, 236 U. S., 351, 362, 59 L. Ed., 616, and *Loomis vs. Lehigh Valley R. Co.*, 240 U. S., 42.

POINT 7.

THE AMENDED ACT TO REGULATE COMMERCE IMPOSES THE DUTY UPON CARRIERS AND CONFERS THE POWER UPON THE INTER- STATE COMMERCE COMMISSION CLAIMED BY THE GOVERNMENT IN THIS PROCEED- ING.

The claims of the government and other appellants before this Court are revealed in the record at page 37, the motion of the United States to dismiss and at pages 60, 61, 62 and 63, in the assignment of errors in the court below. These claims may be affirmatively stated as follows:

(a) The Act to Regulate Commerce, by legislative declaration, imposes upon every **carrier** under the Act engaged in transportation the duty to provide and furnish upon reasonable request such cars as are reasonably necessary for the **handling** of such traffic in interstate commerce of which it is a carrier.

This proposition can not be better supported than by the words in the dissenting opinion of Judge Thompson at pages 54 and 55 of the record:

"In the original act of February 4, 1887, it is said: 'The term "transportation" shall include all instrumentalities of shipment or carriage.' These words are clearly comprehensive enough to include cars as an instrument of shipment. But we need not stop to conjecture as to their full breadth and meaning. It is sufficient that Congress thought proper to enlarge the scope of the term "transportation" by providing in the act of 1906 as follows:

"The term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer

in transit, ventilation, refrigeration, or icing, storage and handling of property transported, and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.'

"This, instead of being a concise and accurate definition of the term 'transportation,' is rather a legislative declaration of what the term shall include. Much broader than the words, 'all instrumentalities of shipment and carriage' in the original act, are the words of the amendment, 'cars and other vehicles and all instrumentalities and facilities of shipment and carriage.' The very comprehensive word *facilities* of shipment and carriage was a significant addition to the original act. These words are again made more comprehensive by the words which follow, 'irrespective of ownership or of any contract, express or implied, for the use thereof.' Whether held by the carrier by purchase, hire, exchange, lease, bailment, or any contract for their use, express or implied, they are to be regarded as the instruments of the carrier, and the shipper, as well as the commission, is thus relieved of the annoyance of dealing with more than one person. The scope of the term transportation is again enlarged by the use of the words, 'and all service in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.' Having thus defined transportation, it is then declared to be the duty of every carrier, subject to the provisions of the act, to provide and furnish such transportation upon reasonable request therefor."

C. R. I. & P. Ry. Co. vs. Hardwick Farmers Elevator Co., 226 U. S., 426, 57 L. Ed., 284, 33 Sup. Ct., 174.

Yazoo & M. V. R. R. Co. vs. Greenwood Gro. Co., 227 U. S., 1, 57 L. Ed., 389, 33 Sup. Ct., 213.

St. L. I. M. & S. Ry. Co. vs. Edwards, 227 U. S., 265, 57 L. Ed., 506, 33 Sup. Ct., 262.

Hampton vs. St. L. I. M. & S. Ry. Co., 227 U. S., 456, 57 L. Ed. 596, 33 Sup. Ct., 263.

(b) It is the duty imposed by the Act upon the Interstate Commerce Commission to enforce the duty upon the carrier to provide and furnish cars upon reasonable request.

Sections 12, 13, 14 and 15, in connection with Sections 1, 2, 3 and 7, cover the entire controversy.

- Texas & Pac. Ry. Co. vs. Abilene Cotton Oil Co.,
204 U. S., 426, 51 L. Ed., 553, 27 Sup. Ct., 350.
- Baltimore & Ohio R. Co. vs. Pitcairn Coal Co., 215
U. S., 481, 54 L. Ed., 292, 30 Sup. Ct., 164.
- Mitchell Coal & Coke Co. vs. P. R. R. Co., 230 U.
S., 247, 257, 57 L. Ed., 1472, 33 Sup. Ct., 916.
- Robinson vs. B. & O. R. R. Co., 222 U. S., 506, 56
L. Ed., 288, 32 Sup. Ct., 114.
- United States vs. P. & A. Ry. & Nav. Co., 228 U.
S., 87, 57 L. Ed., 742, 33 Sup. Ct., 443.
- Morrisdale Coal Co. vs. P. R. R. Co., 230 U. S.,
304, 57 L. Ed., 1494, 33 Sup. Ct., 938.
- Pennsylvania R. R. Co. vs. Puritan Coal Min. Co.,
237 U. S., 121, 59 L. Ed., 867, 35 Sup. Ct., 484.
- Pennsylvania R. R. Co. vs. Clark Coal Min. Co.,
238 U. S., 456, 59 L. Ed., 1406, 35 Sup. Ct., 896.

The words "cars" embraced in the amended Act, section 1, includes all kinds of cars and is used generically.

- Johnson vs. S. Pac. Co., 196 U. S., 1; 49 L. Ed.,
363, 25 Sup. Ct., 158.
- Schlemmer vs. B. R. & P. Ry. Co., 205 U. S., 1;
51 L. Ed., 681, 27 Sup. Ct., 407.
- N. & W. R. R. Co. vs. United States, 177 Fed., 623.
- A. T. & S. F. Ry. Co. vs. United States, 232 U. S.,
199; 58 L. Ed., 568.
- Suttle vs. Choctaw, O. & G. R. R. Co., 144 Fed.,
668.
- C. M. & P. S. Ry. Co. vs. U. S., 196 Fed., 882.
- Penn. Refg. Co. vs. W. N. Y. & P. R. R. Co., 208
U. S., 208; 52 L. Ed., 456, 28 Sup. Ct., 268.

(c) The order enjoined is by every test a lawful and valid order.

It is not objected that the order is not made regularly in proceedings according to the provisions of the

Act to Regulate Commerce or that the conclusions of the Commission were not supported by sufficient evidence, or that the order was so arbitrary as to transcend the powers of the Interstate Commerce Commission. The court below states the finding of the Commission to have been that the railroad company was guilty of an unjust and unreasonable practice in not possessing or in not acquiring and furnishing tank cars in sufficient number to meet the requirements of the complainant's business.

The court states the question:

"The question in this case in the abstract is whether the Act to Regulate Commerce Commission, as amended, imposes upon a carrier the duty to acquire and to provide and furnish transportation of a type that, physically or economically, is best adapted to the needs and uses of the shipper, of which the Interstate Commerce Commission is the judge."

"The question is whether the Interstate Commerce Commission has power to compel the Pennsylvania Railroad Co. to **purchase** and acquire tank cars for the shipment of oil, and to provide the same to complaining shippers upon requests which the Commission may judge reasonable."

We cannot suppress the mental inquiry as to whether this statement and restatement of the question is ingenuous or ingenious when remembering the facts found by the court upon which the question is stated.

"The cost of carrying oil in barrels is 3½ cents per gallon above the cost of carrying it in tank cars * * * making shipment by this method expensive if not prohibitive."

"Ninety-one percent is carried in tank cars * * *. The number of tank cars in the United States is 40,000 * * *. The Pennsylvania Railroad Company owns 499 * * *. The Pennsylvania Railroad Company publishes rates for the transportation of oil in tank cars and furnishes tank cars within the limit of its supply."

Do not these facts show the tank car, as witnesses for the Pennsylvania Railroad admitted, a necessity for

the transportation of oil? Is the question then fairly stated by using such words as "physically or economically best adapted to the needs of the shipper?" Again, reading the order of the Interstate Commerce Commission, is there in it the words "purchase and acquire tank cars?" Did not the order adopt the words of the statute instead "to provide and furnish such transportation?" Did the decree issue upon any such conclusion?

Had the word "tank" been omitted, would there have been any objection to the order? And yet the word is purely adjective and not substantive. Is not a tank car (there are 40000 of them in the United States) a car? Does not every other car have an appropriate description? The Act, in declaring what transportation is, does not leave the word "car" in a technical sense as its equivalent, but includes "other vehicles" which would include a tank car if it is not a "car," and still further, "all instrumentalities and facilities of shipment or carriage and all services in connection with the receipt, delivery * * *, and handling of property transported." How can carriers "receive, deliver or handle" oil in bulk without tank cars, or coal in bulk without coal cars, live stock in bulk without stock cars, perishable goods without refrigerator cars, or passengers without passenger cars? The practical necessity defines the kind of car, but in all cases, the demand for the specific car must be reasonable of which the Interstate Commerce Commission must judge.

Webster defines facility, "quality of being easily performed." In the transportation of oil, a tank car is eminently a facility.

State vs. Mo. Pac. R. Co., 29 Nebr., 550, 45 N. W. 785.

L. R. & F. S. Ry. Co. vs. Oppenheim, 64 Ark., 271, 43 S. W. 150, 44 L. R. A., 353.

The court below accepted the limitations to the powers of the Interstate Commerce Commission as found by

it in *Seofield vs. L. S. & M. S. Ry. Co.*, 4 I. C. C. 158, 2 I. C. R. 67, at which time the Commission did not have the power to fix a rate or regulate a practice, and yet the court refused to find the necessary power to make the order suspended in this case.

To show graphically how great the change was, we quote the second paragraph of section 1 with the changes made by the amendments in bold face type.

"The term 'common carrier' as used in this Act shall include express companies and sleeping car companies. The term 'railroad' as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks and terminal facilities of every kind used or necessary and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property; and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipts, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange, and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation to those entitled thereto."

All that these important changes meant, say the court, were merely to give the Interstate Commerce Com-

mission control over certain services, "ventilation, refrigeration, icing, storage and handling of property," but no change as to "Transportation" except the added "services". No wonder Judge Thompson exclaims,

"From the explicit words of the Act, it would seem to follow that if a reasonable request is made for cars, and the carrier does not possess them, it must acquire them for use by one of the many methods of acquisition. **If not, this most important provision of the statute would be rendered largely nugatory.**" (Bold face ours.)

POINT 8.

THE COMMON LAW IMPOSES THE DUTY UPON CARRIERS TO FURNISH CARS SUITABLE FOR THE TRANSPORTATION IN WHICH THEY ARE ENGAGED.

Judge Thompson in his dissenting opinion (p. 55, Rec.) is clearly right in saying:

“Whatever may have been the duty resting upon a carrier at common law to furnish transportation of the shipper’s property, it admits of no doubt that the furnishing of transportation, as defined by the act, has been made a clear statutory duty of the carrier.”

It seems therefore almost unnecessary to discuss this point, especially in view of the language found in *Texas & Pacific Ry. Co. vs. Interstate Commerce Commission*, 162 U. S., 197, 40 L. Ed. 940, 16 Sup. Ct. 666 (January, 1896):

“The significance of this language in thus extending the judgment of the tribunal established to enforce the provisions of the act to the entire service to be performed by carriers, is obvious.”

However, as the principles of the common law are operative upon all interstate commercial transactions, except so far as modified by congressional enactments, it may be well to briefly notice what such common law duties comprise.

Western Union Telegraph Co. vs. Call Publishing Co., 181 U. S., 92, 45 L. Ed. 765, 21 Sup. Ct. 561.

Whatever may be the duties and obligations imposed by the common law, they are not fixed and definite but expand with the art.

“The common law of a country will never be entirely stationary, but will be modified and extended by analogy, construction and custom so as to em-

brace new relations." *Moss Point Lumber Co. vs. Board of Supervisors of Harrison Co.*, 42 South. 290, 89 Miss., 448.

As said by the Supreme Court in *re Debs*, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. 900:

"Constitutional provisions will not change, but their operation extends to new matters as the mode of business and habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal-boat and sailing vessel, yet in its actual operation it touches and regulates modes of transportation then unknown—the railroad trains and the steamships. Just so it is with the grant of power to the National Government over interstate commerce. The Constitution has not changed; the power is the same, but it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

And again, in *Pensacola Telegraph Co. vs. Western Union Telegraph Co.*, 96 U. S. Rep., 1, 24 L. Ed., 708:

"They extend from the horse and wagon to the stage coach, from the sailing vessel to the steamboat, and from the coach and steamboat to the railroad, from the railroad to the telegraph, as these modes are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate at all times and under all circumstances."

The administration of the Act to Regulate Commerce by the Commission appointed for such purpose is necessarily in consonance with its provisions, and where they are silent upon any matter requiring their regulation, to preserve the purposes of the act reliance upon the principles of the common law is necessary. That this is true is aptly shown in many conclusions of the Commission. The application of such principles is illus-

trated in a dissenting opinion of Mr. Commissioner McChord in the case of *Frankfeld & Co. vs. New York C. R. R. Co.*, 40 I. C. C., 555, and is applicable to the case at bar:

"The defendants not only hold themselves out to carry dressed meats generally, but specifically publish carload ratings on frozen and chilled Argentine meat westbound from shipside at New York. Holding themselves out as common carriers of dressed meat, the common law charges them with the duty of providing safe and suitable equipment in which to transport this commodity. (See *Hutchinson on Carriers*, third edition, sec. 497. *Railroad Co. v. Pratt*, 22 Wall. 123, 133.) It is the contention of defendants that they are under no duty to furnish complainant with cars equipped as required, because they have no cars so equipped, and because under the common law as they construe it the duty to furnish cars is limited to the facilities owned by a carrier, and there is no obligation upon it to acquire other facilities which might be necessary for a particular kind of traffic. However, this is not a correct statement of the law. In *Hutchinson on Carriers*, *supra*, section 495, it is said:

" 'The first duty of the common carrier who holds himself out to the public as ready to engage in the carrying business is, of course, to provide himself with reasonable facilities and appliances for the transportation of such goods as he holds himself out as ready to undertake to carry.'

"This principle of the common law has never been changed or modified. In the marvelous development of commerce and industry, however, it has come about that common carriers in responding to commercial necessities, just as in the present case, now hold themselves out to transport commodities which previously no one thought could be transported as a practical matter and which may not be carried in the sort of equipment commonly employed. In such instances the same rule of law is applied, and common carriers have been held liable for failure to furnish refrigerator cars suitable for the protection of perishable freight received for transportation. See *Hutchinson on Carriers*, *supra*, Sec. 505.

"It is further urged that if it be the duty under the common law to furnish suitable equipment, the obligation of the carrier to furnish special cars is dependent upon the amount of traffic offered by the shipper requesting such equipment. The majority report adopts this view. This contention, however, is clearly unsound, since under the common law rule here invoked the only question is whether the carrier holds himself out to carry the particular commodity. If it does, the duty attaches. The carrier may not hold itself out to carry freight and only accept that kind of freight if a large quantity is offered when in the offer to carry no limitation is made as to the amount that must be offered. The refusal to furnish cars in which to transport the dressed meat of complainants after publishing a carload rate for the transportation of dressed meat is tantamount to a refusal to accept complainants' shipments for carriage. There is no duty upon a shipper under the act or at common law to furnish the car in which his commodity must be shipped. The holding out of the defendants in their tariffs is not limited to the transportation of dressed meats loaded in cars belonging to shippers. For the defendants to publish rates applicable only to the movement in cars furnished by shippers would undoubtedly be unlawful discrimination under the principle in the Train Lot Rate Cases, *Anaconda Copper Min. Co. v. C. & E. R. R. Co.*, 19 I. C. C. 592, 596; *Wells Lumber Co. v. C. M. & St. P. R. R. Co.*, 38 I. C. C. 464, because only certain of the large shippers could avail themselves of the transportation and the ordinary shipper, who does not own cars, would not be able to compete with them. This discrimination, however, is accomplished as a result of the conclusion reached in the majority opinion. Although holding themselves out unqualifiedly in their tariffs as common carriers of dressed meat, the decision in this case in effect excuses these defendants from the discharge of their duty as common carriers to transport shipments of dressed meat offered by complainants. At the same time the rates are permitted to remain in effect, making it possible for the larger American meat packers, who own their own cars, to import

frozen and chilled meats from Argentina, and to secure markets for these meats at which complainants cannot compete. Thus the decision in this case permits indirectly a result which the parties themselves could not lawfully accomplish."

While the court below did not notice the particular objections of the complainant before it to the order enjoined as sustaining its opinion and decree, a point or two may be referred to in closing.

(a) Its objection to furnish cars to go beyond its lines in the through routes over which it publishes through rates in tank cars is met in *Michigan Central Railroad Co. vs. Michigan Railroad Commission*, 236 U. S., 615.

(b) The order does not require the Pennsylvania Railroad Company to seize all tank cars on its line, regardless of ownership or right of control.

Carriers should lease cars only upon such terms as to permit them to meet their obligations to furnish cars without discrimination.

"At a compensation" means "consideration in the lease."

If the word "compensation" includes or comprehends "allowance", then the language of the decision would seem to destroy the "shipper's car", for that language is to the effect that all cars offered the carrier "for use at a compensation will become available to defendant for distribution among all shippers." If "compensation" comprehends "allowance", then the shipper's car ceases to exist the instant it is tendered to the carrier, and such car becomes a carrier's car.

The words "lease" and "rental" have a well-recognized meaning in law. They have been in use for centuries. They applied originally to lands and not to personal property, and while not applied to the latter, the fundamental element of "time" entering into those

words has not been changed. In speaking of a "lease" or a "rental", aside from the consideration, the controlling element is "time". Time is the first thing thought of—the days, the months or the years covered by the lease or the rental. So when a corporation or an individual leases or rents cars to railroads, "time" is of the essence of the contract.

No one would argue that a car leased or rented under these circumstances did not become a public vehicle subject to the use of all shippers without discrimination. Under such circumstances the lessor makes a business of leasing or renting cars to railroads for profit, and it is difficult to even conceive why the lessor should desire to limit the use of such a car. The Commission has no authority in such a lease. The carrier may rent or lease its cars upon such terms as it deems advantageous to itself. It is no concern of the government what the terms of the contract are, as no public question is involved. This may be qualified only to the extent that if the owner of the car is also a shipper the lease of the car may not be used as a cloak for a rebate.

An "allowance" is made only to a shipper. The allowance to shippers rendering any service for furnishing any instrumentality (a car, for instance) for such transportation is provided for by Congress in the fifteenth section of the act.

There is a clearly marked line of distinction between money paid in the form of an "allowance" to a shipper for either furnishing a transportation service or an instrumentality such as a car, and the "compensation" paid to one engaged in the business of leasing cars for profit. The same distinction appears in the "allowance" to a shipper out of the rate and the "division" paid to another common carrier out of the rate. An allowance can be made only where the shipper's freight is

involved. If the freight of others is handled, then he who handles it is either a common carrier as to that business or an agent of the principal carrier. In the case of the shipper's freight, the money paid is an allowance. When not his freight, the money paid is either a division of a rate or compensation to an agent. Under the fifteenth section, the Commission can fix the allowance to the shipper in every case. As to the division of the rate and compensation to the agent, the Commission has no authority, unless the shipper owns the railroad or the agent himself is the shipper.

While the very essence of a lease or rental is "time", that is not true of an "allowance". It applies to a transaction, to a trip, to a journey, and the "allowance" ceases when the trip ends.

Railroad Commission of Ohio vs. Hocking Valley Ry. Co., 12 I. C. C., 398.

United States vs. Pitcairn Coal Co., 154 Fed. Rep., 108.

That the order is void for lack of time in which to comply has been referred to heretofore. That the order is indefinite and uncertain is answered by the language of the act to regulate commerce which the Interstate Commerce Commission followed, and must be read in connection with the conclusions in the opinion.

CONCLUSION.

There is no question of irregularity of proceedings, no doubt of the correctness of the finding of facts, no objection to the sufficiency of evidence. The law is plain.

"It is highly significant, therefore, that the more important duty to furnish transportation has no limitation or condition, except upon the reasonable request of the shipper. If the wisdom of the order in question, or its necessity, needed justifica-

tion, it appears in the conclusive findings of the commission that 91 per cent of the refined oil of the country is shipped in tank cars at a great economic gain."

Respectfully submitted,

CHARLES D. CHAMBERLIN,
DAVID WALLERSTEIN,

Counsel for The Crew-Levick Company.

Dated at Cleveland, Ohio, this 16th day of September, A. D. 1916.

**IN THE
Supreme Court of the United States**

THE OIL TANK CAR CASES.

**THE UNITED STATES AND INTERSTATE COMMERCE
COMMISSION, Appellant,**

VS.

THE PENNSYLVANIA RAILROAD COMPANY.

**THE UNITED STATES, INTERSTATE COMMERCE COM-
MISSION AND CREW-LEVICK COMPANY, Appellants,**

VS.

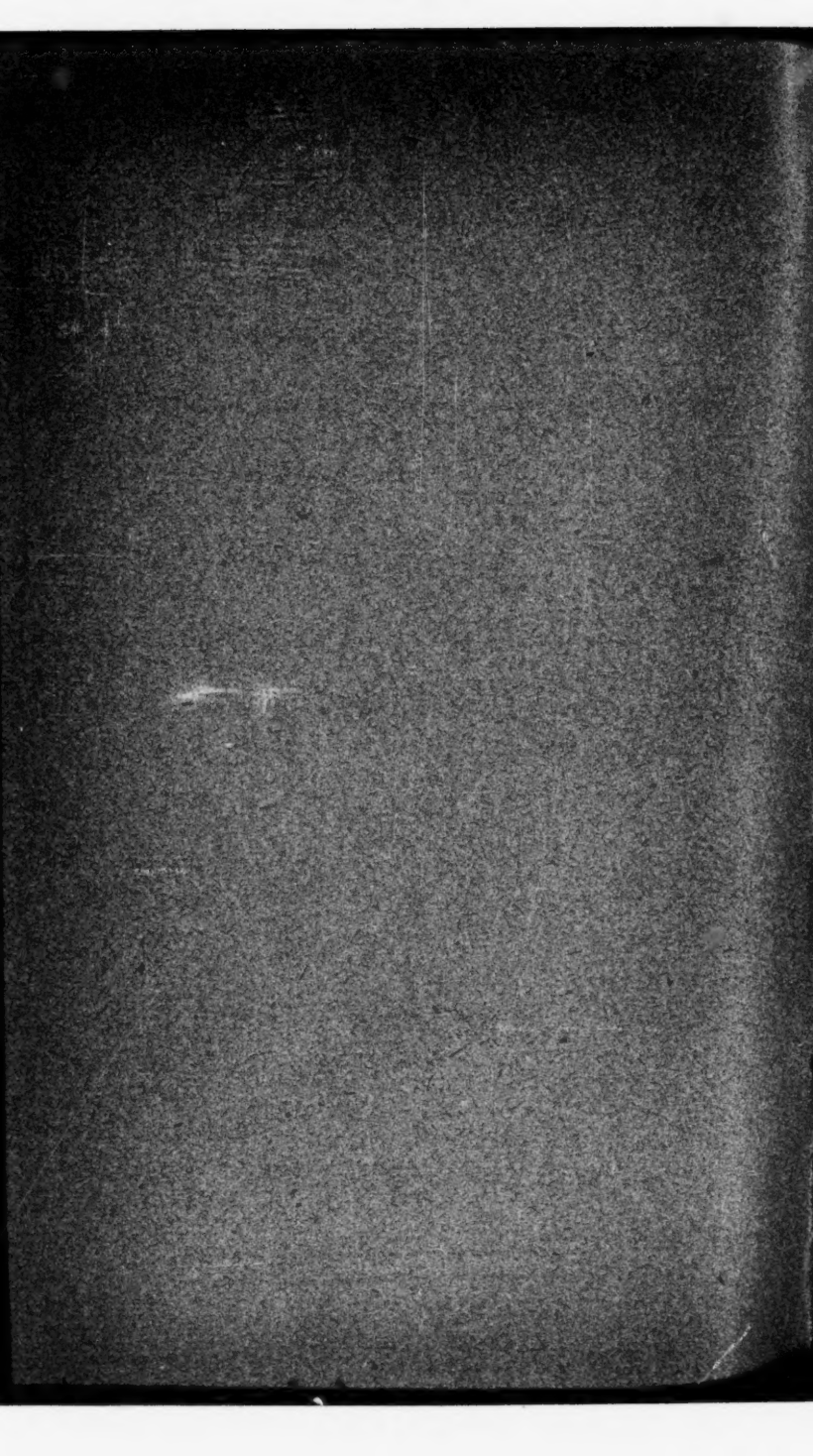
THE PENNSYLVANIA RAILROAD COMPANY.

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA.**

**BRIEF FOR THE PENNSYLVANIA RAILROAD
COMPANY.**

**HENRY WOLF BIKLE,
FREDERIC D. MCKENNEY,
THOMAS PATTERSON,
JOHN G. JOHNSON,**

*Counsel for The Pennsylvania Railroad
Company.*



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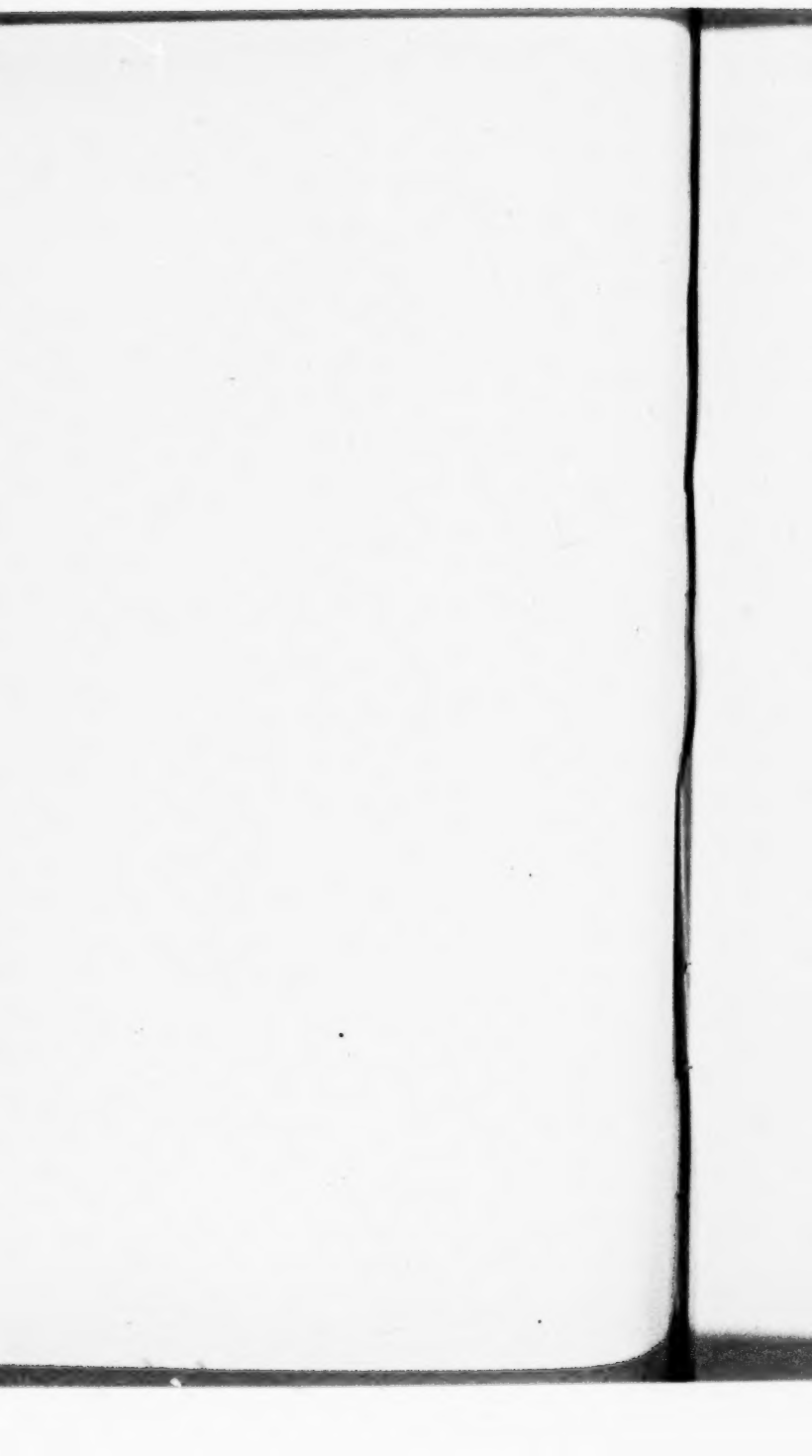
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In the Supreme Court of the United
States.

THE OIL TANK CAR CASES.

OCTOBER TERM, 1916. NOS. 340 AND 341.

*The United States and Interstate Commerce Commission,
Appellants,*

vs.

The Pennsylvania Railroad Company.

*The United States, Interstate Commerce Commission and
Crew-Levick Company, Appellants,*

vs.

The Pennsylvania Railroad Company.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

**BRIEF FOR THE PENNSYLVANIA RAILROAD
COMPANY.**

STATEMENT OF THE CASE.

These appeals bring up for review the validity of orders entered by the Interstate Commerce Commission in two proceedings initiated before that tribunal by complaints filed, the one by the Pennsylvania Paraffine Works and the other by the Crew-Levick Company. Copies of these complaints are attached to the bills filed in these suits, designated "Exhibits A," their general purport requesting that the Interstate Commerce Commission order The Pennsylvania Railroad Company to furnish tank cars to the complainants as stated in the bills. (Record in No. 340, page 5; in No. 341, page 7.)

The Railroad Company filed answers to the complaints, and also motions to dismiss, for the reason, as alleged, that the Commission was without jurisdiction to entertain the complaints or to grant the relief prayed for (Record in No. 340, pages 13 and 16; in No. 341, pages 15 and 18). The Commission assumed jurisdiction, however, and hearings having been held, the proceedings in question eventuated in each instance in an order reading as follows:—

"It is ordered, That The Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist, on or before August 15th, 1915, and thereafter to abstain, from refusing upon reasonable request and reasonable notice therefor to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the Act to Regulate Commerce and amendments thereto.

"It is further ordered, That said defendant be, and it is hereby notified and required to provide, on or before August 15th, 1915, and thereafter to furnish, upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

"And it is further ordered, That this order shall continue in force for a period or not less than two years from the date when it shall take effect." (Record in No. 340, page 34; in No. 341, page 35.)

The cases present, therefore, the question of the power of the Commission to require the furnishing of VEHICLES OF A SPECIAL TYPE having no reference to the safety of transportation, and *not*, as indicated by the Government (page 1 of its brief), the power of the Interstate Commerce Commission to require railroads to provide and furnish [generally], upon reasonable demand, an adequate number of cars for interstate transportation.

ARGUMENT.

The importance of the present cases has not been exaggerated by the Government. The orders entered by the Interstate Commerce Commission are calculated, if sustained, to accomplish a result which Congress has steadily refused to bring about by specific and direct legislation.

Thousands of cars moving over the rails of the carriers of this country are privately owned, a situation largely due, it is believed, to the early conception of a railroad company as a highway of transportation as well as a transporter of commodities. In fact, the specific obligation to receive vehicles privately owned and to move them over its rails has been incorporated in the charter of more than one railroad; and this is true of The Pennsylvania Railroad Company, the appellee in this proceeding.

The oil industry is a striking illustration of the extent to which private ownership of these vehicles of transportation has been carried. Thus the report of the Commission in the present proceedings states that of the tank cars owned by corporations and shippers east of the Mississippi River, 27,700 are privately owned (R. 21)* and only 802 are cars

*As in the Government's Brief (see page 6) references to the record, unless otherwise noted, will be to the record in No. 341.

of railroad ownership (R. 20-21). In fact, the companies, whose complaints initiated the present proceedings, have themselves invested in tank cars, and the Commission's report shows that at the time of the hearing the Pennsylvania Paraffine Works owned 54 and the Crew-Levick Company 57 tank cars (R. 21). Nor is there any suggestion in the record that these cars were not voluntarily purchased by the shippers.

As is pointed out in the brief filed on behalf of the Government, this situation was long ago brought to the attention of Congress, but, in spite of this, Congress has consistently declined to indicate by any specific or direct language an intention to require a change. In the face of this situation, however, the Commission has sought, by laying hold of general language, to justify the exertion of an extraordinary power and to bring about by indirection a result which Congress has refused—and it is submitted has intentionally refused—to accomplish by specific enactment.

The Pennsylvania Railroad Company respectfully submits that the orders entered by the Interstate Commerce Commission in the proceedings referred to were without legal warrant for the following reasons:—

I. The Act to Regulate Commerce does not impose on a railroad company the obligation to furnish tank cars or to increase the supply of tank cars which it may have available.

It is not pretended that the Commission had any power to make orders such as those here under discussion prior to the Hepburn Amendment of 1906 to the Act to Regulate Commerce. In fact the Commission itself had emphatically disclaimed any such power:

Scofield *vs.* Lake Shore & Michigan Southern Ry.,

2 I. C. R. 67 (1887);

Rice *vs.* Cincinnati etc. Ry., 3 I. C. R. 841 (1892).

Accordingly it is necessary to consider only whether the amendment of 1906 has made any change in this regard, since neither the amendment of 1910 nor any other amendment contains any provision which would enlarge the obligations of the carrier or the power of the Commission with respect to this matter.

1. THE HISTORY AND PURPOSE OF THE AMENDMENT OF 1906. THIS AMENDMENT WAS NOT INTENDED TO ENLARGE THE COMMON LAW OBLIGATIONS OF THE CARRIER WITH RESPECT TO THE FURNISHING OF EQUIPMENT; AT THE MOST THE AMENDMENT MERELY TRANSMUTED THE OBLIGATION INTO A FEDERAL OBLIGATION.

The provision of the amendment of 1906 which is relied on by the Government and the Commission is that portion of Section 1 which reads as follows:—

"The term 'railroad,' as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership, or of any contract, express or implied, for the use thereof and all services, in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration, or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable

request therefor, and to establish through routes and just and reasonable rates applicable thereto."

This provision, in those features which are operative in the present case, and which have been italicized, follows, word for word the bill recommended by the Interstate Commerce Commission itself in its Report of 1905 (page 177). The provision as it there appears is as follows:—

"The term railroad, as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term transportation shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor."

It will be seen that the insertions made by Congress in the provision recommended by the Commission do not affect the present controversy.

It thus appearing that the statutory mandate here invoked had its source in the recommendations of the Commission it is not only of interest, but of importance as indicating the true construction of the section in the light of the situation it was intended to meet, to refer to the explanation made by the Commission to Congress of the purpose intended to be accomplished by the enactment. This explanation is found on pages 6 and 7 of the Commission's Report of 1905 and is as follows:—

"ENLARGEMENT OF JURISDICTION.

"It will be seen that the changes proposed in the first section are designed (a) to somewhat increase the jurisdiction of the law as to the carriers subject to its provisions and (b) to bring within the scope of the law certain charges and practices which are not now subject to regulation or respecting which there is dispute as to the power of the Commission. The first purpose is accomplished by leaving out of the first paragraph the phrase 'under a common control, management, or arrangement,' in order to reach certain classes of carriers which are now exempt from the obligations and requirements of the act. The second purpose is sought to be accomplished by enlarging the definition of the term 'transportation,' so as to include the charges for various services, such as refrigeration and the like, which are now claimed to be beyond our authority. The obligation to furnish and provide *the services here referred to** is also imposed, which is likewise a point now in dispute. No other changes are proposed in the first five sections of the act, which are commonly spoken of as containing its principal or substantive provisions. In other words, the only amendment suggested in this regard is an enlargement of jurisdiction. *In this connection, and AS ILLUSTRATIVE OF THE MATTERS HERE REFERRED TO, the subject of refrigeration charges may be properly considered.**

"REFRIGERATION CHARGES.

"At the present time large quantities of perishable commodities are transported over such distances that artificial refrigeration is necessary. From comparatively small beginnings this traffic has grown to enormous proportions. In the transportation of these commodities the icing is just as essential as the hauling of the car. The owner of the commodity transported can no more provide the refrigeration than he can provide

* Italics ours.

the transportation itself. The consequences of exacting an exorbitant icing charge or of imposing upon one shipper a higher charge for refrigeration than is imposed upon his competitor are precisely as serious as the same kind of extortion or discrimination would be in the transportation charge itself. Every reason which requires that the freight rate should be published and maintained, subject to supervision and control by the Commission, applies to these charges for refrigeration.

"As the business is now conducted, some railroad companies furnish refrigeration themselves, but in most cases it is furnished by independent companies which usually provide the car, for which the railway pays, and the ice, for which a charge is made against the shipper. Formerly there were several of these companies, but today the business has fallen into the hands of two or three, of which the Armour Car Lines is the principal. Extended investigations by the Commission have led to the conclusion that the charges imposed are, in some cases at least, exorbitant, and that those charges are not uniformly exacted.

"The Commission has held that the furnishing of refrigeration is a part of the transportation itself, and that the railway is, under the present law, obliged to publish and maintain these charges for icing. The railways, however, confidently insist, first, that the providing of refrigeration is a local service, not a part of the transportation, which is not and cannot be put under the supervision of any Government tribunal; and, second, that even if the Congress might impose upon the carrier the duty of furnishing this service, it has not done so; that the service is furnished by private persons, and not, therefore, subject to the jurisdiction of the Commission.

"In view of the great importance of these charges to the shipper, we suggest that the Congress ought to make that service, by express provision in the law, a part of

the transportation itself. We do not at this time recommend that carriers should be prohibited from using private cars or from employing owners of such cars to perform the icing service if they find that course to their advantage, but we do recommend that these charges should be put on the same basis as all the other freight charges. They should be published and maintained the same as the transportation charge, and be subject to the same supervision and control."

In view of the statements made by the Commission to Congress, it is not a little remarkable to find the Commission now insisting on the breadth of jurisdiction involved in the promulgation of orders such as those here under attack; and it is not without significance that Judge Clements, the only present member of the Commission who was a member of the tribunal when the amendment of 1906 was passed, dissents from the opinion of the majority. In this dissent he is joined by Mr. Commissioner Harlan and Mr. Commissioner Clark, who were appointed as a result of the enlargement of the Commission in 1906. It thus appears that the three Commissioners most closely in touch with the inception of the legislation here under discussion do not share the views entertained by their more recently appointed associates.

It is also proper to observe in this connection, that the District Court interprets the statute as intended to accomplish just what the Commission reported to Congress was its purpose. That this decision was correct is fully established by a consideration of the history and phraseology of the amendment.

It is important to remember that the private ownership of railroad cars, including tank cars used in the transportation of oil, had continued for many years and was well known to the public, to the Commission and to Congress.* In fact the charter of The Pennsylvania Railroad Company

* Special reference is made to the discussion of the subject by the Commission in its Annual Report to Congress for 1891, page 34.

requires it to permit its rails to be used as a highway for the movement of privately owned cars. Act of April 13, 1846, P. L. 312, Section 21; *Boyle vs. Philadelphia & Reading Ry. Co.*, 54 Pa. 310 (1867). The Commission itself has referred to this characteristic of the railroad's charter in the case of *Hillsdale Coal and Coke Company vs. P. R. R. Co.*, 19 I. C. C. 356 (1910) at page 369. See also the Commission's Report to Congress for 1891, at page 35.

The prevalence of the private ownership of cars used for shipments over the rails of the various railroad companies had an important bearing in determining the Commission's initial views with regard to the tank car question, as appears from the following statement of Mr. Commissioner Bragg in his opinion in the *Scofield Case*, *supra*, in which he says, at page 77:—

“Another phase of the statute is presented by this proceeding, namely, that of the shipper furnishing in part his own cars. Long prior to and at the time the Act to Regulate Commerce was enacted there was a prevailing general custom and usage among railroads of the United States of renting cars from each other and from mere car furnishing companies, paying rent for the use of such cars. A like custom and usage then prevailed, and has since, of the carrier paying rent to the shipper for cars occasionally furnished by the shipper for the transportation of his own goods. This amount in each instance then was, since has been, and is now three fourths of a cent per mile. It is part of the legislative history of the country that Congress had pending before it for many years in various forms the general subjects which were afterwards enacted into the Act to Regulate Commerce, and that all these matters were made the subject of lengthy and thorough examination by committees of Congress. We must, therefore, presume, as we heretofore have done, that Congress must have known at the time the statute was enacted of the existence of each of these customs

and usages on the part of the carriers for obtaining cars, and neither of them are forbidden by the statute. If the carrier had been forbidden by the statute from transporting freight over its line otherwise than in its own cars, bulk would have necessarily been broken and cars unloaded by every railroad at the end of its line and there reloaded into the cars of its connecting line, resulting in greatly increased delays and expense in the transportation of freight; and we can well understand why the statute contains no provision requiring the carrier to transport freight only in its own cars."

The references in the Government brief (pages 38 to 45) and in the brief for the Commission (pages 25 and 26), to the debates in Congress clearly indicate that the subject was well understood by that body, but there is not the slightest evidence that Congress intended the carriers to take over the privately owned cars or to provide themselves with special equipment in no way adapted to the safe transportation of commodities.

In view of the prevalence of the private ownership of cars, it is impossible to believe that the Hepburn amendment was intended to change the degree of the obligation of the carriers with respect to furnishing the equipment for the transportation of commodities which were partly or largely transported in privately owned cars of a special description. Certainly, if the Congress of the United States had intended any change of such profound magnitude, and had intended to endow the Commission with a power which the Commission had already decided it did not have, the provisions to this end would have been much more specific and definite than the provisions on which the complainants rely.

The same considerations which moved Commissioner Bragg to deny the power of the Commission under the original act apply with equal force to the amendment of 1906. Thus in the Scofield Case, referred to above, Mr. Commissioner Bragg says, at page 76:—

"The reference to 'instrumentalities of shipment or carriage' in the first section of the statute proceeds upon the assumption that every railway carrier will, from self interest, as well as in obedience to the law, perform the plain duty to itself and to the public of providing proper and adequate car equipment for all the reasonable needs of its business. The power, if it should be held to exist at all, on the part of the Interstate Commerce Commission to require a carrier to furnish tank cars when that carrier is furnishing none whatever in its business, would apply equally to sleeping cars, parlor cars, fruit cars, refrigerator cars, and all manner of cars as occasion might require, and would be limited only by the necessities of interstate commerce and the discretion of the Interstate Commerce Commission. A power so extraordinary and so vital, reached by construction, could not justly rest upon any less foundation than that of direct expression or necessary implication, and we find neither of these in the statute."

The complainants rely, however, on that portion of Section 1 of the Act which has already been quoted on page 5 of this Brief.

The corresponding portion of the Act of 1887 is as follows: "And the term transportation shall include all instrumentalities of shipment or carriage." The effect of the Act of 1906, therefore, is to further define the term "transportation" and to impose on the carrier the obligation to furnish such transportation upon reasonable request. But it is impossible to derive from this general language any substantial basis for contending that Congress meant to require a carrier to discontinue transporting privately owned cars or to provide itself with special equipment to such an extent as to render useless such special cars already privately owned by individual shippers.

It seems clear, therefore, that the requirement to furnish transportation was clearly intended to do no more

than to transmute into an obligation under federal law the common law obligation of the carrier in this regard. That obligation required the carrier to furnish transportation upon reasonable request and to transport safely the goods entrusted to it, and the decisions cited in the complainants' brief are all illustrative of this rule.

Moreover, since, as will be shown, the common law obligation did not extend beyond the furnishing of vehicles reasonably adapted to the safe transportation of the commodities carried, it becomes unnecessary to discuss the meaning of the word "provide" in that portion of Section 1, quoted above in this brief, on which word the appellants place so much reliance.

2. THE COMMON LAW DOES NOT REQUIRE RAILROAD COMPANIES TO FURNISH A SPECIAL TYPE OF VEHICLE HAVING NO REFERENCE TO THE SAFETY OF THE TRANSPORTATION.

But there never was an obligation at the common law to supply a vehicle of a particular form or description when such form or description had no reference to the *safety* of transportation. In the present instance, the special vehicle which the Commission attempts to require the carrier to purchase adds nothing to the safety of transportation, but merely is alleged to increase the economy of transportation to the shipper, by relieving him of the cost of confining his property in packages suitable for shipments and by facilitating its loading and unloading.

It is confidently submitted that no such obligation ever existed at common law. It is confidently believed that not a single Court decision can be cited in support of the proposition. On the contrary, all the cases decided by the Courts with reference to the duty to furnish equipment of a specialized character are found on examination to be merely illustrative of the duty to furnish *safe* transportation. The typical instance is the refrigerator car, and the principal cases will be found in a note to the case of *Forester vs. Southern Ry.*, 147 N. C. 553, 18 L. R. A. (N. S.) 508 (1908). See also *Atlantic Coast Line Ry. Co. vs. Geraty*, 166 Fed. 10, 20 L. R. A. (N. S.) 310 (1908).

It requires but a cursory examination of the cases, including those cited by the appellants, to find that the general language used is directed to the duty of the carrier to transport safely. It is for this purpose that the vehicle must be adequate.

The point is well illustrated in the leading case of *Beard vs. Illinois Central R. Co.*, 79 Iowa 578 (1890), cited by the complainants. The comments in that case with reference to the duty to furnish adequate equipment clearly mean that the carrier must answer for the safety of the commodities it undertakes to transport—its long-established duty—and cannot excuse its dereliction in this regard because of its non-ownership of the type of equipment requisite for this purpose. The Court says:—

“We may here assume that defendant will be excused from using refrigerator cars. But it is shown that the butter could have been carried safely by the use of ice in the box cars. It was defendant’s duty to use it. But, having accepted the butter for transportation, defendant cannot escape liability for not safely transporting it, on the ground that it did not have cars sufficient for that purpose.”

This is the principle which emerges from the decisions cited by the appellants, but it is impossible to find in any one of them, or in a decision of any Court that has come to the attention of counsel for the Railroad, support for the proposition that the carrier is required to furnish a vehicle of a special character having no connection with the safety of the transportation.

In the case of *Covington Stock Yards Co. vs. Keith*, 139 U. S. 128 (1891), cited by the Government at page 16 of its brief, the Court was speaking primarily of the duty to provide for the delivery of the commodity carried, not as to the specific method of fulfilling that duty.. Thus, in the present case, the Railroad admits its obligation to transport and deliver oil, but denies the existence of any obligation to do this in a particular manner which has no reference to the safety of the service.

In the case of the State *vs.* Cincinnati, etc., Ry. Co., 47 Ohio State, 130 (1890), cited by the Government on page 24 of its brief, what is said as to the duty of the railroad company to provide facilities for transportation is *purely incidental to the question of whether any discrimination in rates had been established*. This is put beyond question by the judgment entered by the Court which is restricted to the question of rates. Furthermore, the vital issue was discrimination; and it is entirely unnecessary to consider what, if any obligations, with respect to special vehicles might be predicated on the general obligation which requires a carrier to serve its patrons without undue discrimination, since *the complaints in the present cases are absolutely devoid of any allegation of discrimination*, and there is no finding by the Commission which even remotely would support the inference that any discrimination had resulted to either the Pennsylvania Parafine Works or the Crew-Levick Company in the matter of car supply.

In fact neither in the original complaints nor anywhere else in the record is there an obligation that the oil companies have been discriminated against either because of the general fact that many tank cars are privately owned, or because of the actual service accorded by the carrier.

The arguments put forward by the Government (page 69) of its brief find absolutely no support in the facts as presented by this record.

The case of Cincinnati &c. Ry. Co. *vs.* Fairbanks & Co., 90 Fed. 467 (1898) cited on page 25 of the Government's brief, merely holds that the railroad is responsible for the safety of the goods delivered to it though moving in cars privately owned. It cannot properly be cited for the broad proposition contended for by the Government.

And this is believed to be the significance of the decisions of this Court in Chicago, Rock Island, etc., R. Co. *vs.* Hardwick Farmers Elevator Company, 226 U. S. 426 (1913), Interstate Commerce Commission *vs.* Illinois Central R. Co., 215 U. S. 452 (1910), and the other decisions

cited on page 30 of the Government's brief and page 20 of the Commission's brief, all of which as well as the cases cited on pages 20 and 21 of the Government's brief involve ordinary equipment only. The only principle which can be legitimately drawn from these cases, so far as the present controversy is concerned, is that Congress has legislated with reference to the carrier's duty to furnish to shippers cars and facilities for transportation. There is not the slightest support in either case for the proposition that the legislation of Congress is intended to require the furnishing of a vehicle of a special description. The character of the equipment is for the carrier to determine, with the qualification, perhaps, that the carrier must answer for the safety of the goods which it transports.

The true principles to be derived from the cases, not only those cited by the appellants, but others, are (a) that a carrier is required to respond in damages if it fails to transport *safely* the goods which it offers to carry, and it cannot excuse itself from this liability on the ground that its equipment was not adapted to the transportation of the commodity accepted; and (b) that Congress has legislated in Section 1 of the Act to Regulate Commerce with reference to the duty of the carrier to furnish to its shippers cars and facilities for transportation, but has not legislated with reference to the precise character of the vehicles of transportation. Beyond these principles the cases do not go, and the principles which the appellants seek to draw from them evince a misconstruction of their true meaning and a misapplication of the rules which they establish.

Moreover, it is earnestly denied that The Pennsylvania Railroad Company has held itself out as ready to furnish to an unlimited extent tank cars for the transportation of oil. As stated in the Commission's brief (page 29) the Railroad Company's rates on oil in tank cars are published subject to the general provision of its tariffs that in providing ratings for articles in tank cars, it does not assume any obligation to furnish tank cars. It is also denied that a finding by the Interstate Commerce Commission that there was a holding out under the circumstances referred

to is a finding as to a question of fact. Whether or not the publication of rates in the manner referred to, and the fact that the railroad company furnished such cars as it had, constituted a holding out within the legal meaning of the term is a question of law for the Court to decide. In fact the very announcement referred to expressly negatives the holding out of a readiness to supply tank cars generally.

So long as there is no unreasonableness or discrimination in the rates, and so long as the carrier's equipment is adapted to the safe transportation of the goods entrusted to it, there is nothing in Section 1 which in any way restricts the right of the carrier to choose and select the vehicle of transportation which it regards as most satisfactory for the conduct of its business. The carrier therefore fulfills its full obligation under this section when it is prepared to transport the shipments offered to it when properly packed and prepared for shipment in accordance with its regulations in this regard.*

It cannot be denied that the obligation which is asserted to exist is one of vast and far-reaching character, and it could never have been the intention of Congress that a generalized statement such as is found in the concluding por-

* It is hardly necessary to cite authorities in support of the proposition that the carrier is entitled to prescribe reasonable rules and regulations with reference to the manner and form in which shipments will be received for transportation; but it may not be amiss to call attention to the following:—

Harp vs. Choctaw, etc., R. Co., 125 Fed. 445, at page 449 (1903);

U. S. vs. Oregon Navigation Co., 159 Fed. 975, at page 979 (1908);

Oxlade vs. Northeastern Ry. Co., 15 C. B. (N. S.) 680 (1864);

Robinson vs. B. & O., 129 Fed. 753 (1904);

Millinery Jobbers' Assn. vs. American Express Co., 20 I. C. C. 498 (1911).

These cases and many others which might be cited, fully justify the response of the Railroad Company's General Manager to the complainants' demand that the Railroad Company increase its tank car equipment.

tion of the second paragraph of Section 1 should be construed to enlarge the obligations of carriers to the extent contended in this case. The whole history of legislation with respect to the obligations of carriers disproves such a contention.

Moreover the obligation, such as it is, which is imposed upon the carriers by the provisions of the first section of the Act to Regulate Commerce, relates to the vehicles already owned by the carriers. This is abundantly proved by the language of the Act itself, adverted to in the following passage from the opinion of the District Court:—

“We find nothing in the original or amended act which, by express language, imposes upon a carrier the extraordinary duty or confers upon the Interstate Commerce Commission the extraordinary power claimed by the Government in this proceeding. If they exist, they can be found only by implication, and it is doubtful if Congress would leave to implication an intention to impose so onerous a duty and to grant so great a power. On the other hand, we find in the act, by clear expression, duties imposed upon carriers which are not absolute in their nature, but are qualified by the ability of the carriers to conform to the duties prescribed.

“The provision of the act requiring a carrier to maintain and operate switch connections with lateral or branch line railroads, appearing in the last paragraph of the first section of the act, imposes upon a carrier the duty to ‘furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper.’ The words ‘to the best of its ability,’ of course, qualify the duty to maintain switch connections, and do not qualify the prohibited discrimination.

“Again, in section 3 of the act, it is provided that ‘every common carrier shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for receiving, forwarding, and delivering

of passengers and property.' Here, again, the carriers' duty to provide and furnish facilities of transportation is not absolute. The duty is laid upon them 'according to their respective powers.' Such expressions rather raise the implication that Congress did not intend to place an absolute and unqualified duty upon carriers to furnish cars of a certain type whether they had them or not, and if they did not have them, then to acquire them, whether they had the money or not. Restricting our construction of the act to its words, and finding nothing by implication that changes or qualifies their meaning, we are of opinion that the amendment of 1906, including cars within the definition of 'transportation,' added nothing to the original duty of the carrier as prescribed by the original act and as interpreted by the Commission, and vested in the Commission no increase of power over cars as instrumentalities of shipment. If, under the act as amended, no different or greater duty is imposed upon a carrier with respect to furnishing and providing cars than was prescribed by the original act, then the practice of the carrier found unlawful in this case was not a violation of the statute, and the order of the Commission directing the carrier to desist from that practice was an exercise of power not conferred by law."

3. HAD CONGRESS INTENDED TO IMPOSE AN OBLIGATION, SUCH AS THE COMMISSION HAS ASSERTED IN THESE CASES, SO IMPORTANT A PURPOSE WOULD NOT HAVE BEEN LEFT TO INFERENCE.

The Safety Appliance Acts indicate that when Congress contemplates the imposition of obligations with respect to the equipment of carriers, it covers the subject by careful specific rules. Moreover, it is pertinent to inquire why committees of Congress should consider, as they continue to do from time to time, the wisdom of devolving on carriers the duty to furnish steel coaches for passenger traffic, if already the

provisions of the Act to Regulate Commerce are broad enough to cover matters of this kind.

Furthermore, in its twenty-seventh annual report, the Interstate Commerce Commission recommends (page 82), that the Commission "be empowered * * * to require the adoption and use of steel or steel under-frame cars in passenger train service." The steel passenger coach is directly adapted to secure the safety of passenger transportation. It is therefore a means of accomplishing the admitted obligation of the carrier to furnish safe transportation, and yet the Commission itself recognizes that the Act as at present drawn does not impose on the carrier the obligation to furnish such equipment.

How much less can it be contended that the carrier is required by the Act to furnish tank cars which have no relation whatever to the safety of transportation, but relate only to the convenience of the shipper.

As stated by Mr. Commissioner Bragg in the Scofield case, 2 I. C. C. 67, "A power so extraordinary and so vital, reached by construction, could not justly rest upon any less foundation than that of direct expression or necessary implication, and we find neither of these in the statute."

II. Even if the Act to Regulate Commerce imposed upon a railroad the duty to furnish tank cars, the Commission has chosen the wrong method to enforce the obligation.

I. THE VARIOUS PROVISIONS OF THE ACT TO REGULATE COMMERCE, WHEN CONSIDERED IN THEIR RELATION TO EACH OTHER, INDICATE CLEARLY THAT THE COMMISSION IS WITHOUT AUTHORITY TO ENTER AN ORDER OF THE CHARACTER INVOLVED IN THESE CASES.

As the Court well knows, the legislation known as the Act to Regulate Commerce has been evolved by a series of amendments to the original Act of 1887. A recognition of this fact will be of material service in determining the proper meaning of its provisions.

The Commission has predicated its order on the obligation which is assumed to arise from the provision of Section 1, which has been commented on in the first portion of this Brief, and from the requirement of Section 12 that "the Commission is hereby authorized and required to execute and enforce the provisions of this Act." The point which, in this portion of this brief, is urged upon the Court is that, even assuming the correctness of the position of the Commission and of the Government as to the meaning of Section 1 of the Act, and assuming the Commission's duty to enforce the Act, *the Commission has chosen the wrong method to accomplish the desired result.* That is to say, it has selected the wrong proceeding for the exertion of its authority; and this is not merely a technical mistake but is a mistake of the utmost importance, since it has sought to invoke the highly penal provisions of the Act to enforce an obligation which is not intended to be enforced in this manner.

The provision of Section 12 which has just been quoted was incorporated in the Act to Regulate Commerce by an amendment passed in 1889; but this amendment included that portion of Section 12 which immediately follows the part quoted. This portion, which has been omitted in the Commission's opinion and also in the Government's brief, is as follows:—

"and, upon the request of the Commission, it shall be the duty of any District Attorney of the United States to whom the Commission may apply to institute in the proper Court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the Courts of the United States."

The second portion of this amendment of 1889, just quoted by us, clearly discloses the method by which the

Commission was at that time intended to execute and enforce the Act.

Furthermore, a new section was added to the Act in 1889, designated Section 23, as follows:—

“That the Circuit and District Courts of the United States shall have jurisdiction upon the relations of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement and all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier, for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: Provided, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact as undetermined, upon such terms as to security, payment of money into the Court, or otherwise, as the Court may think proper, pending the determination of the question of fact: Provided, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the Act to which it is a supplement.”

It will be observed, therefore, that the Act, as it stood at that time, contained a specific provision having to do with the furnishing of cars or other facilities for transportation, and it was under the Act as thus amended that the Commission in the case of *Rice vs. Cincinnati Railroad*,

3 I. C. R. 841 (1892), decided that the decision in the Scofield case must be adhered to.

With the passage of time, however, the remedies afforded by the Interstate Commerce Act were found to be inadequate to accomplish the character of regulation desired by Congress and new obligations were devolved on the carriers, and new methods of enforcing these obligations were annexed thereto in order to accomplish the desired end. *In creating this new machinery, however, it was not made co-extensive with all the obligations of the Act, but was limited to the cases specified.*

A simple example of this is found in the amendment to Section 20 of the Act, commonly known as the Carmack Amendment, which imposes on an initial carrier a through liability for the transportation of the freight which moves from a point on its line to a point on some other line outside of the State of origin. The Commission has consistently denied that it has any authority to enforce this provision of the Act to Regulate Commerce. In other words, the machinery provided for the enforcement of the Act does not, in this instance, include the exertion of the tremendous power to issue a penal order which has been asserted in these proceedings.

Blume & Co. *vs.* Wells, Fargo & Co. 15 I. C. C. 53 (1909);

Jeynes *vs.* P. R. R., 17 I. C. C. 361 (1909);

Atlas Portland Cement Co. *vs.* L. V. R. R., 32 I. C. C. 487 (1914).

The specific method which the Commission seeks to use in the present instance to enforce the obligation which it assumes to exist under Section 1 of the Act is the method provided in Sections 15 and 16 of the Act: that is to say, the entry of an order in a proceeding initiated before it by the filing of a complaint by some person, firm, corporation or association. *There is absolutely no question that this is the power sought to be exercised. That these cases originated with complaints filed under the authority of Section 13,*

and that the procedure is in accordance with Sections 15 and 16, appears from the record, and it is idle for the Government or the Commission to attempt to deny that the Commission is acting under the sections of the Act referred to. In fact, this is clearly conceded by the Commission itself on page 188 of its opinion (R. 24).

The Commission has entered an order to remain in effect for two years, and enforceable, if valid, by a fine of \$5000 a day in case of disobedience. But the instances in which an order of this character may be entered are restricted in Section 15 to cases in which some rate, regulation, classification or practice is claimed to be unjust, unreasonable, or unduly discriminatory. This section reads as follows:—

“That whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or after full hearing under an order of investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this Act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this Act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation or practice is just, fair and reasonable, to be thereafter followed, and to make

an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. All orders of the commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction." [Italics ours.]

It need not be argued in this case that there is involved no rate, regulation or classification. The only word upon which the decision can be based is the word "practice." Under the well settled rule, this word must be interpreted with reference to its context, and as intended to refer to a matter *ejusdem generis*. If the word "practice" can be interpreted to justify what has been attempted in the present cases, it is manifest that the Commission could control every incident of railroad management and operation. This is recognized by the dissenting Commissioners in the present cases. Thus, Mr. Commissioner Clark says on page 195, in his dissenting opinion:—

"If the Act confers upon the Commission power to order a carrier to enlarge its complement of cars and to award damages against it if it fails to comply with such order, it seems logically and necessarily to follow that the Commission has the same power to order enlargement of terminal facilities, increase in the number of locomotives, and extension of tracks or branches. In fact, no facility of transportation is exempt. I think that this power is vested in the courts

and not in the Commission. For the reasons that were more fully stated in the dissent in the Vulcan Coal Mining Co. case, I am not able to accept the views of the majority on this point."

The dissenting opinion in the Vulcan case referred to by Mr. Commissioner Clark, which was concurred in by Mr. Commissioner Harlan and Judge Clements, is so apposite that it has been printed as an Appendix to this brief.

There is another consideration which is believed to place beyond controversy the proposition that Sections 15 and 16 do not justify an order of the character entered in this proceeding.

On reference to Section 1 of the Act, it will be found that it is, in general, an enumeration of certain duties imposed on the carrier by the Act. Most of these provisions refer to duties connected with transportation which the carriers are required to fulfill. Sections 2, 3 and 4 are primarily intended to bring about equality of treatment as among shippers. Section 5 deals with pooling agreements, while Section 6 relates to the filing of tariffs. It will be observed, therefore, that Section 1 is primarily concerned with the fundamental things which the carrier shall and shall not do, separate, and distinct from the obligation to treat its patrons with equality, in respect of those things which it does or does not do.

Now, in this Section 1 there are sundry provisions, among them the mandate to furnish transportation upon which the Government relies, the provision that charges shall be reasonable, the provision that just and reasonable classifications of property and that just and reasonable regulations and practices affecting classification, rates, &c., shall be observed, the anti-pass provision, the commodities clause, and the provision requiring the construction, maintenance and operation of a switch connection in proper cases. *It does not at all follow that all of these obligations are enforceable in the same manner.* In fact, Section 1 itself specifically declares the method of enforcing the obligation to furnish a

switch connection. In all probability a violation of the requirement that a railroad shall furnish transportation would be available directly in favor of a shipper in a proper proceeding to recover damages for a breach of the obligation. It is respectfully submitted that the *machinery of redress provided in Sections 15 and 16 of the Act is limited to the obligations established in the third and fourth paragraphs of Section 1*, which read as follows:—

“All charges made for any service rendered to or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, *shall be just and reasonable*; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, that messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages; and provided further, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.

“And it is hereby made the duty of all common carriers subject to the provisions of this Act to *establish, observe, and enforce just and reasonable classifications of property, for transportation, with references to which rates, tariffs, regulations, or practices, are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property, for transportation, the facilities for transportation, the carrying of personal, sample and excess baggage, and all other matters relating to or connected with the receiv-*

ing, handling, transporting, storing, and delivering of property subject to the provisions of this Act which may be necessary or proper to assure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful."

The Court is earnestly asked to compare the language of these paragraphs with the language of Section 15 quoted above. Such a comparison will disclose beyond question, it is believed, that the Congress intended to provide in Sections 15 and 16, the machinery for enforcing the provisions in the paragraphs of Section 1 referred to.

Finally the debates in Congress show beyond peradventure that the extraordinary powers conferred upon the Commission in Sections 15 and 16 of the Act *were primarily intended to secure the effectiveness of the regulation of rates, and the matters incidental thereto*, and this is confirmed by the fact that in many instances special remedies are provided for breaches of the obligations of the Act. Thus in Section 1, there is a special remedy for violations of the anti-pass provisions, and another special remedy for failure on the part of a carrier to install a siding connection. The very fact that in this second instance special reference is made to Section 15 indicates that the remedies of that section would not otherwise be available. There is an obvious similarity between the furnishing of a siding connection and the furnishing of vehicles to be used for the transportation.

Again, in Section 6, there is a specific remedy in case of failure or refusal on the part of the carrier to comply with the terms of any regulation adopted and promulgated by the Commission under the provisions of that section, and another separate remedy for the misquotation of rates.

Again in Section 10, there are special penalties provided for the mis-billing of freight, and for other offenses there described. Likewise, in Section 20, specific remedies are provided. It is unnecessary to extend this discussion. What has been said clearly proves that not all obligations of the Act are intended to be enforced by orders of the Commission, and all proper considerations indicate that the obligations imposed by Section 1, whatever they may be, with respect to furnishing of cars, are not enforceable in the manner which the Commission has adopted in the present instance.

It was the rate-making function and related powers that were intended to come within the special remedies of Sections 15 and 16 of the Act, and not a duty such as that here asserted, which is totally unrelated to the matters which Congress had in mind in devising the machinery for securing the effectiveness of rate-making. Herein is found a full answer to the contention of the Government on page 48 of its brief, that the fact that this remedy may be a more effective remedy than mandamus proves that it exists. This is obviously a *non sequitur*. And besides it remains to be established that the remedy is more effective in cases of this character than the ordinary judicial remedies.

2. THE PROVISIONS OF SECTION 15 OF THE ACT TO REGULATE COMMERCE, THE SECTION UNDER WHICH THESE PROCEEDINGS WERE BROUGHT, INDICATES CLEARLY THAT THE COMMISSION IS WITHOUT AUTHORITY TO ENTER AN ORDER OF THE CHARACTER INVOLVED IN THESE CASES.

This case involves no rate, no regulation, no practice. It needs no argument to show that no rate is involved, and it is believed that none is needed to show that no regulation is attacked. What "practice" is called in question? Will the appellants say that it constitutes a "practice" within the meaning of the Act for the carrier to furnish only five hundred tank cars? It might as well be contended that it

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constitutes a practice within the meaning of the Act for the carrier to provide a certain building as its station at Philadelphia, and that this practice can be investigated by the Commission and the carrier required to pursue a different practice, viz., to build and maintain a station in the said city costing not less than thirty million dollars.

If the suggested argument were sound, it could be contended with equal reason that every detail of railroad operation is a practice within the meaning of the Act, why should the Commission ask that it be empowered to require the use of the block signal system? (Report of 1913, page 82.) Why should the Commission make this request if, because of its jurisdiction with respect to practices, it is already endowed with power to regulate the details of operation of carriers? The presence of non-technical words in statutes almost invariably leads to some vagueness of meaning and some uncertainty of import, but it is not believed that the word "practice" contains sufficient vagueness or uncertainty to lend the least support to the contention of the complainant. The following definitions of the word, taken from the best dictionaries, are worthy of reference:—

Thus the Standard Dictionary defines the word: "Any customary action or proceeding regarded as individual; habit; as, the *practise** of almsgiving; the *practise* of chewing tobacco. An established custom; a prescribed usage; as the *practise* of shaking hands."

The Century Dictionary gives the following definition: "Frequent or customary performance; habit; usage; custom."

The Oxford Dictionary, the most complete and scholarly of modern dictionaries, gives the following definitions: "The habitual doing or carrying on of something; usual, customary, or constant action." "A habitual way or mode of acting; a habit, custom; (with *pl.*) something done constantly or usually; a habitual action."

While the word "practice" has certain other uses, an

* The Standard Dictionary spells the word with an "s."

examination of any of the dictionaries will indicate that the above definitions explain the meaning of the word as it is used in the Act to Regulate Commerce.

The language of the Act itself supports this interpretation of the word. Thus in Section 15 the Commission is authorized to prescribe "the just and reasonable * * * rate or rates * * * to be thereafter observed * * * and what * * * regulation or practice is just, fair and reasonable *to be thereafter followed*, and to make an order that the carrier or carriers shall * * * conform to and observe the regulation or practice so prescribed."

It is manifest that the use of the word "followed" indicates a continued method of operation and not merely a single act. The same conclusion results from the requirement that the carrier shall observe "the regulation and practice so prescribed." This phraseology clearly indicates that the "practice" which the Commission may impose on the carrier is inherently similar in character to the regulation. In other words, the implication is inescapable that the words are essentially similar in import, and the probability is that the intention was to endow the Commission with power to regulate practices which might be covered by regulations, but which had not been specifically so defined.

The decisions of the Commission clearly indicate an acceptance of this interpretation of the word. By virtue of the grant of power implied in this word, the Commission has regulated the methods of distributing coal cars. *Rail & River Coal Co. vs. B. & O. R. R. Co. et al.*, 14 I. C. C. 86 (1908). *Hillsdale Coal & Coke Co. vs. P. R. R. Co. et al.* 19 I. C. C. 356 (1910). *Interstate Commerce Commission vs. Illinois Central Ry.*, 215 U. S. 452 (1910). A scheme of car distribution constitutes a continued method of operation. So also a custom of a railroad company to receipt for certain freight "shipper's load and count." *Ponchatoula Farmers Assn., Ltd. vs. Ill. Central Ry.*, 19 I. C. C. 513 (1910). The practice pursued in permitting the transportation of premiums in packages; *Ouerbacker Coffee Co. vs. So. Ry. Co.*, 18 I. C. C. 566 (1910). Simi-

larly a method of delivery has been dealt with by the Commission: Wholesale Fruit, etc., Assn. *vs.* A. T. & S. F. Ry. Co., 14 I. C. C. 410 (1908). The transit privilege, *In re Rates, etc.*, on Wool, 23 I. C. C. 151 (1912). Fabrication in transit, 29 I. C. C. 70 (1914), and numerous other cases relating to the transit privilege. Compression of goods in transit, Merchants, &c., Co. *vs.* I. C. R. R., 17 I. C. C. 98 (1909). Concentration in transit, Meredith *vs.* St. Louis, &c., Ry., 23 I. C. C. 31 (1912). Dumping and trimming, New England Coal & Coke Co. *vs.* N. & W. Ry., 22 I. C. C. 398 (1912). Storage, Commercial Club of Duluth *vs.* N. C. Ry. Co., 13 I. C. C. 288 (1908). Furnishing of car stakes, National Wholesale Lumber Dealers' Assn. *vs.* A. C. L. R. R., 14 I. C. C. 154 (1908). Notifying shipper of refusal of freight, Kehoe *vs.* N. C. & St. L. Ry. Co., 14 I. C. C. 555 (1908). Scaleage deductions, Baltimore Chamber of Commerce *vs.* P. R. R. *et al.*, 15 I. C. C. 341 (1909). And see the case of Loomis *vs.* L. V. R. R., 240 U. S. 43 (1916), cited on page 60 of the Government's brief, and the cases which are cited in conjunction therewith.

The cases disclosing the Commission's understanding of the word "practice" could be multiplied, but the foregoing are amply sufficient to show that the word is used in the Act in its customary sense and contemplates a continued method of operation, which might possibly be covered by a formal regulation.

If it had been the intention of Congress to endow the Commission with power to require the purchase of equipment of specialized character, is it not reasonable to suppose that Congress would have defined the manner in which, and the extent to which, this great power might be exercised? A power to require the purchase of equipment necessarily involves some power with reference to the character of the equipment to be purchased. Will it be contended that the Commission has the right to prescribe just what price shall be paid for cars, of what capacity they shall be, what method of construction shall be observed in

their manufacture? Even the subject of safety appliances has been carefully regulated by Congress by a specific statute. Will it be supposed, then, that Congress intended to confer a power of far greater magnitude by the grant in general terms of the power to require that reasonable practices shall be followed. The suggestion is preposterous.

In this connection it should not be forgotten that the tank really supplies the place of the package and relieves the shipper of the necessity of providing such package. *The car is not adapted to the shipment of goods in packages* as are box and gondola cars which are sometimes used for the transportation of commodities in bulk, but is *adapted only* to the transportation of liquid articles unconfined in any package. The shippers are asking in effect, therefore, that the railroad be required to furnish the package for their commodity, and this has been recognized by the Commission in various of its decisions. Thus in the case of *Independent Refiners Assn. vs. Western N. Y., etc., Ry.*, 4 I. C. R. 162, the Commission says, at page 170: "The tank of the tank car performs the function of the package in tank shipments as the barrel does in barrel shipments." See also *Rice vs. Cincinnati, etc., Ry.* 3 I. C. R. 841, at page 848, and the Annual Report of the Commission for 1891, found in 3 I. C. R. 757, at page 775.

To require the carrier to purchase additional equipment may involve a demand that the carrier increase its capital account, and the power of the Commission can only properly be determined by a consideration of its right to require such action on the part of the railroads. For, if the Commission is endowed with power of this character, its power should be plenary. It is obvious that no such power exists, since the railroads are still subject to the requirements of the States with respect to the increase of capital and indebtedness. The Act to Regulate Commerce provides no method for the increase of the stock or bonds of railroads when new capital is needed in order to increase the carrier's equipment.

When it is remembered that the Commission as early as

1888 had denied its power to require the purchase of tank cars, it is inconceivable that Congress should have intended to endow it with this great power by the general language used in the Act. If such power had been contemplated, clear and definite words would have been used, which would have placed the existence of the power beyond controversy. Reference may again be made to the Safety Appliance Laws as indicating the care with which Congress provides the extent of the carrier's obligation in respect of the equipment to be furnished.

It is to be further noted that the power for which the complainants contend is not a power to require the carrier to furnish transportation, *but a power to furnish vehicles of a special type, of a type which has nothing to do with the safety of the transportation, but which is alleged merely to increase the commercial convenience of the shipper.* It is difficult to believe that Congress would consent in any event to impose so serious a burden upon the railroads of the country; but if it could be persuaded to do so, it is manifest that its requirements in this regard would be so clear and definite as to leave no room for argument.

It is impossible that the Court will accord much consideration to the contention of the Government that "whether a particular manner of doing business constitutes a practice is a question of fact which, in case of dispute, is for the Commission to determine" (brief for the United States, page 59). The cases cited in support of this proposition do not sustain it, since the Court itself, in the decisions referred to, determined whether or not the controversy was within the jurisdiction of the Commission. To permit the Commission to determine finally whether or not a given controversy involves a "practice" within the meaning of the Act would be to enable it to define the limits of its own jurisdiction. This would be contrary to the settled rule that it is a question of law whether or not a given controversy is within the jurisdiction of the Commission. Thus in the case of the Interstate Commerce Commission *vs.* Union

Pacific Railroad Company, 222 U. S. 541 (1912), this Court, in enumerating the classes of cases in which the Courts may review an attempted exercise of power by the Commission, includes the case which raises the question whether the power attempted to be exerted is "beyond its statutory power."

The meaning of the word "practice" involves a question of statutory construction and necessarily presents a judicial question. Further, it does not involve the determination of some controversy upon which expert administrative knowledge is required, and is distinguished also in this regard from the cases cited by the Government in support of their extraordinary contention.

Finally it may properly be asked why the Commission should recommend, as it has done in its reports (Report of 1913, page 82), as well as in previous reports, that it be endowed with authority to require the railroads to purchase steel passenger cars if the provisions of Section 15 of the Interstate Commerce Act are already sufficient to enable it to require the purchase of tank car equipment. The steel passenger coach has a direct relation to the safety of transportation, which is admittedly an obligation of the carrier. It is not a specialized form of equipment restricted in the scope of its use, but is available generally for all passenger transportation. Since the Commission concedes its lack of power under the present law to require the purchase of steel passenger cars, a conclusion which is obviously shared by Congress, how much more is the Commission without power under the present act to order the purchase of tank cars, which have nothing to do with the safety of transportation, and constitute a specialized character of equipment available for use only in connection with a limited class of shipments.

This was fully realized by Mr. Commissioner Bragg, when he said, in the Scofield Case, *supra*, at page 76:—

"The power, if it should be held to exist at all, on the part of the Interstate Commerce Commission to require a carrier to furnish tank cars when that carrier is furnishing none whatever in its business, would apply

equally to sleeping cars, parlor cars, fruit cars, refrigerator cars, and all manner of cars as occasion might require, and would be limited only by the necessities of interstate commerce and the discretion of the Interstate Commerce. A power so extraordinary and so vital, reached by construction, could not justly rest upon any less foundation than that of direct expression or necessary implication, and we find neither of these in the statute."

The foregoing discussion shows that *the word "practice," as used in Section 15, does not include the duty to furnish transportation, since that duty is separately dealt with in paragraph 2 of Section 1. Practices are incidental matters connected with the performance of the service of transportation, and the nature thereof is clearly outlined by the specific language used by Congress in the fourth paragraph of Section 1.*

It follows, therefore, that the requirement of Section 1 as to furnishing transportation—whatever may be its true scope—is *not a requirement which is enforceable by an order of the Commission entered in accordance with the procedure outlined in Sections 15 and 16, and carrying with it the tremendous penalties provided in those sections.*

Section 13 of the Act has no application to the present proceeding, except in so far as it permits a complaint to be made of any violation of the Act to Regulate Commerce. The section does not confer authority upon the Commission to enter an order of the character described in Sections 15 and 16 upon *any* complaint. The only portion of Section 13 which confers upon the Commission the right to enter an order is the concluding portion dealing with *investigations instituted by the Commission on its own motion.* This provision is as follows:—

"And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the

provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or things concerning which the inquiry is had excepting orders for the payment of money."

The portion of Section 15 quoted on page 19 of the Complainant's Brief and reading as follows, clearly has nothing to do with the case:—

"The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act."

This is not a grant of new power, but only the statement that the grant of the power in question shall not exclude the exercise of any other power which may have been conferred.

Since the Government and the Commission cannot deny that the present proceedings have resulted from complaints filed with the Commission, it follows that the extraordinary power to issue orders enforceable by the imposition of a penalty of \$5000 per day does not apply, since such an order is permitted to be entered only in a proceeding founded upon a complaint dealing with a rate, regulation, classification, or practice. While the Commission has a right to investigate other complaints dealing with alleged violations of the Act to Regulate Commerce, its power of enforcement is not by the entry of an order, but by the other machinery provided in the Act, for example, that found in Section 12, and in the ninth paragraph of Section 20 of the Act, which reads as follows: —

"That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier,

to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them."

The decisions clearly sustain the case of the Railroad Company. Thus the order entered in the case of *B. & O. R. R. vs. Interstate Commerce Commission*, 221 U. S. 612 (1911), and *Interstate Commerce Commission vs. Goodrich Transit Company*, 224 U. S. 194 (1912), *were both sustained under Section 20 of the Act*, which specifically authorizes the Commission to require reports, &c. In no way do they indicate any disposition on the part of this Court to enlarge the right to enter an order in a case coming before the Commission on complaint as prescribed in Sections 15 and 16.

The very fact that Section 20 of the Act prescribes a specific means for its enforcement, viz., a penalty of \$100, for each and every day a carrier fails to comply with a requirement of the Commission, confirms the contentions of the Railroad Company that it is not every provision of the Act that is enforceable by the penal order provided for in Sections 15 and 16 of the Act.

The case of the *Atchison Railroad vs. United States*, 232 U. S. 199 (1914), involved what is admitted to be a practice and therefore was properly within the scope of Section 15. Moreover, the contest in this case was with regard to the right to perform the service not with regard to the obligation to do so.

Apparently the Government realizes the difficulty of maintaining its position that the present proceedings involve a practice within the meaning of the Act to Regulate Commerce, since the cases which are cited in support of this proposition are far from sustaining it, and there is consequently (page 61 of the Government's brief) an effort to justify the order even if the controversy does not involve what is strictly a practice. But this particular section of the Government's argument fails to point out the statutory provision which would justify the conclusion sought to be reached. The *Pipe Line Cases*, 234 U. S. 548 (1914), the only decisions invoked, are

distinguishable because, as has just been pointed out, they involved an investigation begun by the Commission itself, and furthermore, no contention was presented in the case that the order was not within the scope of the Commission's authority if the obligation in question was devolved upon the Pipe Lines by the Act. In the absence of an attack on the procedure adopted by the Commission, the case is without bearing upon this feature of the controversy.

III. The order of the Commission is not administrative in character, but is uncertain, indefinite and unlawful.

Mr. Commissioner Meyer, in his opinion, has contended that the Commission has jurisdiction in this case because administrative questions are involved, but the order which the Commission has entered is not administrative in character, but, on the contrary, distinctly legislative in its essential nature. The important portion of the order is as follows:—

"It is further ordered, That said defendant be, and it is hereby, notified and required to provide, on or before August 15th, 1915, and thereafter to furnish, upon reasonable request and reasonable notice at complainants' respective refineries, tank cars in sufficient number to transport said complainants, normal shipments in interstate commerce."

"It is further ordered, That this order shall continue in force for a period of not less than two years from the date when it shall take effect."

Except for the fact that this order runs in favor of the particular complainants, it is a legislative command, and it is obvious that the Commission has sought to use phraseology closely resembling the rule of law with regard to the furnishing of service on the part of a common carrier, with this qualification that they have required in the order

that the service to be accorded shall be the furnishing of tank cars.

The order says that the cars are to be furnished upon *reasonable* request and *reasonable* notice "in sufficient number to transport said complainants' *normal* shipments in interstate commerce." What is reasonable notice? The definition of this would constitute a customary exercise of the administrative function. So also a statement of the number of cars which would be sufficient for the complainants' normal shipments would constitute an exertion of administrative power, but these truly administrative problems are left unsettled and the Commission contents itself with enunciating a legislative principle as applicable to the specific situation, but seeks to give it the sanction of a penalty of \$5000 per day by assuming to enter it under the authority of Sections 15 and 16 of the Act.

In their efforts to escape the obvious defect of the order, counsel for the Government have sought to use a portion of the Commission's opinion as indicating what would be the normal shipments of the complainants and they have referred to what the Commission says at the bottom of page 183 and the top of 184 of its opinion (R. 33, 34, referred to in the Government's brief on page 80) as to shipments which, in the period designated, were made by the complainants.

But the answer to this contention is so obvious as hardly to require statement. It will be remembered that the fundamental complaint of each petitioner was that it did not receive enough cars for its normal shipments *and unless these complaints were unfounded, it would follow that the shipments actually made were not normal shipments.*

Furthermore, the Commission has not stated that the carriers might treat as the normal shipments of the complainants, which they should prepare to transport, the volume of shipments made in the past.

The order of the Commission, therefore, leaves the railroad with an uncertain, indefinite standard of conduct which, however, it must observe, at a risk of a penalty of

\$5000 per day, and this penalty runs against all its officers and agents who may be responsible for obedience to the Commission's order. Surely this was never intended by the Act to Regulate Commerce, nor would it be constitutional. Clear authority will be found in the case of *International Harvester Company vs. Kentucky*, 234 U. S. 216 (1914), and *Collins vs. Kentucky*, 234 U. S. 634 (1914), both of which require that a definite rule of conduct shall be laid down before penalties may be imposed.

Furthermore, that the question before the Commission is not administrative in character is clearly indicated by the fact that the Supreme Court of the United States has sustained Court actions for failure to furnish equipment in the cases of *Louisville & Nashville R. R. Co. vs. Cook Brewing Co.*, 223 U. S. 70 (1912); *Eastern Ry. vs. Littlefield*, 237 U. S. 140 (1915); *Pennsylvania Railroad Company vs. Puritan Coal Mining Company*, 237 U. S. 121 (1915), and *Illinois Central Railroad Company vs. Mulberry Hill Coal Company*, 238 U. S. 275 (1915). (See the Government's brief, page 65, and the Commission's brief, pages 34 to 38). In the last case, decided June 14, 1915, the Court, after discussing the Puritan case, clearly indicates that no administrative question is involved in an action brought to recover damages because of failure on the part of a carrier to supply a sufficient number of cars. Thus the Court says:—

"Upon a review of Sections 8 and 9 of the Act to Regulate Commerce and of the proviso in Section 22 which declares that 'nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies,' we held (page 130) that while the Act gave shippers new rights, it at the same time preserved existing causes of action; that it did not supersede the jurisdiction of State Courts in any case, new or old, where the decision *did not involve the determination of mat-*

ters calling for the exercise of the administrative power and discretion of the Commission or relate to a subject as to which the jurisdiction of the Federal Courts had otherwise been made exclusive; that in actions against railroad companies for unjust discrimination in interstate commerce where the rule of distribution itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the authority of the Interstate Commerce Commission; but if the action is based upon a violation or discriminatory enforcement of the carrier's own rule for car distribution no administrative question is involved, and such an action, although brought against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the State or Federal Courts."

Clearly, therefore, the Commission is regarded as having exclusive jurisdiction where an administrative question is involved and since the recovery was sustained, it is manifest that the Supreme Court was of the opinion that such a question was not in the case.

Nor is the case of *Pennsylvania R. R. Co. vs. Clark Coal Co.*, 238 U. S. 456 (1915) any authority for the jurisdiction of the Commission. That was a discrimination case, pure and simple, and indicates nothing as to the jurisdiction of the Commission in cases which do not involve—as the cases at bar do not—the discrimination feature.

If the court will consider the situation which would arise if the order of the Commission should be sustained and complaint be made of its violation, it will readily perceive the defective nature of the order. Could the Court determine for itself from the order of the Commission how many cars the complainant shippers should have per month, and if not, is the rule of conduct prescribed by the Commission of such definiteness as to justify the imposition of a penalty of \$5000 per day? If there were a predicate for an order of this kind, it would

devolve on the Commission to determine the cars to be furnished so that the standard of conduct might be definite and certain. *This is the very essence of the administrative function*, and in rate cases it is well recognized. It would obviously be unlawful for the Commission to find an existing rate unreasonable and order the carrier to discontinue charging such rate and charge only what might be reasonable. *The administrative duty is to indicate what is a reasonable rate; and so, in this case, the administrative duty would be to indicate what would be a reasonable notice and a reasonable request, and what would be the normal shipments of the complainants, and a sufficient number of cars therefor.*

This consideration gains additional weight when reference is made to the decision of this Court in *United States vs. Pacific and Arctic Company*, 228 U. S. 87 (1913), in which it was pointed out that an indictment could not be maintained for unjust discrimination under the Act to Regulate Commerce in the absence of prior action by the Interstate Commerce Commission. It would seem to follow necessarily that the Court deemed it essential that there should be a finding by the Commission as to the evidence of the unjust discrimination. Similarly in the present case, if any question should arise as to whether the orders entered by the Commission in these cases have been complied with, it is difficult to conceive how the question involved could be more essentially an administrative one than the question involved in the *Pacific and Arctic* case. And yet, to refer it to the Commission would make that tribunal both legislator and judge and jury in the premises, a situation not conducive to a fair decision. Furthermore, the orders of the Commission are presumed to be enforceable in the Courts, but the considerations alluded to would indicate a necessity for further administrative action before the controversy could be then proceeded with.

In brief, what the Commission seeks to do is to declare that the obligation of the carrier to serve its patrons extends to the furnishing of a specialized vehicle, and then to add to the remedies adapted to the real common law obligation the extraordinary remedies intended to effectuate the Commis-

sion's authority over rates and similar collateral issues where experience has demonstrated the necessity for a specific form of redress.

IV. The order of the Commission is defective in that it requires the railroad company to supply cars for movement over the lines of other carriers.

As is stated in the opinion of the Commission, the Pennsylvania Paraffine Works and the Crew-Levick Company are located as well on the line of the New York Central System as on the line of the Pennsylvania System. The order of the Commission in terms requires The Pennsylvania Railroad Company to furnish cars to transport said complainants' normal shipments "in interstate commerce." The Commission may not have meant to require the Pennsylvania Railroad to furnish cars for shipment over the lines of the New York Central, but its language seems to require such action. Clearly this is unlawful. And it is of special consequence in view of the fact that the oil companies have evidenced a disposition to use the New York Central routes (R. 21-22).

Moreover, it is respectfully submitted that the Commission is not entitled to require The Pennsylvania Railroad Company to furnish cars for the movement of shipments to points beyond its own rails unless at the same time it provides terms and conditions on which such cars shall be delivered to the connecting carrier in order to insure to the Pennsylvania Railroad the proper liability on the part of other carriers for the return of the equipment. That an exertion of power such as is sought to be accomplished in this case is unlawful is decided by the Court of Civil Appeals of Texas in *Gulf & C. R. R. Co. vs. Texas*, 120 S. W. 1028 (1909). In a later case, *G. H. & S. A. Ry. vs. Jones*, 104 Texas, 92 (1912), the Supreme Court of Texas cites this case with approval and says:—

"The charge (of the Court below) correctly tells the jury that the railroad company was not bound to permit its cars to go on the line of the second railroad company."

It is true that the case of *Michigan Central Railroad Company vs. Michigan Railroad Commission*, 236 U. S. 615 (1915) goes very far in the direction of sustaining an order requiring that a railroad permit its cars to go beyond its rails, but even in that case it is pointed out that reasonable compensation to the carrier whose cars are used in the interchange is provided for. It is respectfully submitted that the Commission cannot enter an order of this character requiring the carrier to furnish equipment to move freight beyond its own rails without taking some means to safeguard the rights of the owning carrier.

This feature of the case acquires, in the present proceeding, very unusual importance in consequence of the fact stated in the Commission's opinion that The Pennsylvania Railroad Company owns more tank cars than all the other carriers east of the Mississippi River combined. Its tank car ownership amounted at the time of the hearing to 499 cars. The total ownership of the other carriers east of the Mississippi River amounted to 303 cars, whereas the privately owned tank cars east of the Mississippi River amounted to 27,700. It therefore appears that the railroad ownership is less than 3 per cent. of the total ownership east of the Mississippi, and that of this 3 per cent. The Pennsylvania Railroad Company is furnishing more than half. If now it is compelled to furnish all the tank cars required for the transportation of oil from points on its line irrespective of their destination, it is obvious that a burden out of all proportion is placed upon this Company. As shown by the evidence in this case, oil was shipped even by these oil companies to destinations on the lines of other carriers, some in far distant points in the country. Clearly the statement on page 11 of the Government's brief that, "the destinations of practically all of the refiners' shipments were points on the line of the railroad company," is based on a misapprehension. No such statement appears on page 21 of the Record, the page cited. On page 20 it is stated that, "complainants

assert that defendant's line is *the most direct route* to nearly all of the destinations to which they are accustomed to ship"—a very different thing, since the *destinations* may well be, under this assertion as they actually are, frequently on the lines of other carriers. Furthermore, although the New York Central Railroad serves the complainants equally with the Pennsylvania Railroad and supplies no tank cars whatsoever, no order is made against it, but, on the contrary, the entire burden is devolved upon the Pennsylvania.

It is suggested by the Government (page 77 of the Government's brief) that it would be time to raise the objection when the railroad company should be requested to send one of its cars beyond the limits of its own lines; but this consideration overlooks the fact that the Commission's order must be construed in the light of its rulings and also in the light of the decision of this Court in the cases cited by the Government.

V. The order of the Commission requires an interference with the rights of owners of private cars.

In connection with this feature of the case, the Court's attention is respectfully asked to that portion of the Commission's opinion appearing on page 193:—

"The record does not show such technical knowledge to be needed in the shipment of petroleum products in tank cars as to render unreasonable complainants' request to furnish cars. The fact that the defendant has for more than 20 years past been furnishing tank cars for the shipment of oil bears witness to the contrary. We see no particular hardship to defendant arising out of the necessity of allowing its equipment to move beyond its line. Further, the necessity of defendant's purchasing a large number of additional tank cars does not follow from our holding in the present case. The requirement of the act is that defendant provide and furnish, not necessarily buy, a reasonably adequate supply of cars, and the 13,-

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would be precipitated if the Commission's order should be interpreted to require the disregard of private ownership of cars it has been deemed proper to present this feature of the case for discussion in order that the true situation may be ascertained.

The opinion of the majority of the Commissioners and the brief of the Government disclose an effort to construct a case by placing in juxtaposition passages from the Act to Regulate Commerce and decisions of the courts which, when taken out of their proper setting and used without reference to their context, afford a partial resemblance to a foundation for the contentions which are made. And this structure is then sought to be reinforced by arguments as to the importance of avoiding discrimination.

It is frankly conceded that the elimination of discrimination was one of the great purposes of the Act to Regulate Commerce, but the Government's contentions in this regard are singularly devoid of any proper support in the present cases since there is not even the most remote suggestion of discrimination in the complaints which initiated the proceedings, and no finding by the Commission which by any interpretation can be made to imply that discrimination results to any one.

There is consequently no just basis, even in the most general point of view, for the extraordinary power sought to be exercised by the Commission, "a power," which, as Mr. Commissioner Bragg said in the Scofield case, "so extraordinary and so vital, reached by construction, could not justly rest upon any less foundation than that of direct expression, or necessary implication, and we find neither of these in the statute."

HENRY WOLF BIKLÉ,
FREDERIC D. McKENNEY,
THOMAS PATTERSON,
JOHN G. JOHNSON,

Counsel for The Pennsylvania Railroad Company.

OCTOBER 10, 1916.

APPENDIX.

DISSENTING OPINION OF MR. COMMISSIONER CLARK IN
VULCAN COAL MINING CO. *vs.* I. C. R. R., 33 I. C. C.
520

"Clark, Commissioner, dissenting:

"The Commission is vested with broad powers and wide discretion. In part its duties are *quasi* judicial, but it is primarily and essentially an administrative body, exercising powers which are legislative in their nature and which are delegated to it by the Congress and are limited by the terms of the delegation. It is clearly our duty to observe and enforce the substantive and definite provisions of the act, with due consideration for the letter and the spirit of the law. The operation of the railroads is inseparably bound up with the commerce of the country. The demands upon the railroads are varied in their nature, and they vary greatly with changing conditions. It is therefore necessary, while observing the letter and the spirit of the law, to construe and administer it in workable ways and so that commerce and transportation will be promoted and not retarded.

"In so far as federal legislation and regulation go, the carriers have so far been left to exercise their own judgment in the construction of roads and the equipment thereof. The roads are built and operated by private owners and for financial profit. It is therefore presumed that a carrier will, in so far as it is able to do so, provide itself with such facilities as will on the whole permit it to serve its patrons and earn the largest possible revenue, with proper consideration for judicious investment and proper economies.

"The railroads are permitted to provide equipment by purchase, lease, or rental. In *Interstate Commerce Commission vs. I. C. R. R. Co.*, 215 U. S. 452, it was held that a railroad's car supply may be legally suffi-

lateral branch lines of railroad or private side tracks, and to 'furnish cars for the movement of such traffic to the best of its ability.' This language seems to recognize the fact that the carrier may not, and probably will not, be able at all times to furnish desired cars, but it must furnish them 'to the best of its ability' and without discrimination between shippers.

"Section 7 of the Act prohibits carriers from preventing the carriage of freight from being continuous from the place of shipments to the place of destination by carriage in different cars, break of bulk, stoppage, or interruption, which is not made in good faith for some necessary purpose.

"Section 8 of the Act provides that if a carrier shall do anything prohibited, or omit to do anything required of it, by the Act, it shall be liable to the person injured for damages sustained in consequence thereof, together with reasonable counsel or attorney's fee, 'to be fixed by the court in every case of recovery.'

"In Section 20 of the Act it is provided that the Courts of the United States shall have jurisdiction upon the application of the Attorney General of the United States, at the request of the Commission alleging a failure to comply with, or violation of, and of the provisions of the Act, to issue writs of mandamus commanding such carriers to comply with any provision of the Act.

"Section 23 of the Act specifically confers upon the Federal Courts jurisdiction, upon the relation of any persons, firm, or corporation alleging such violation by a carrier of any provision of the Act as prevents the relator from having interstate traffic moved at the same rates charged, or on as favorable conditions as those given to, any other shipper, to issue a mandamus commanding a carrier 'to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ.' Such mandamus may issue notwithstanding any question of fact as to

proper compensation to the carrier is undetermined, upon such terms as to security for payment as to the Court may seem proper.

"Under the well-known conditions of transportation by railroad, and responsive to the plain intent of the law as expressed by the prohibition hereinbefore referred to against interruption to through shipments, and the requirement that carriers shall establish and maintain through routes and joint rates, it is essential that cars shall be freely interchanged between carriers. The varying conditions in different sections of the country at different seasons of the year and in different years render it, I believe, impracticable and impossible for the carrier which receives from a connection a loaded car to always deliver in return therefor an empty car. In addition to this there are multitudes of instances in which, and many times and seasons of the year when, such exchange of an empty for a load is neither desired nor desirable. The empty car may not be needed there, but may be badly needed at some other point or by some other connecting road.

"A carrier being required to be a party to through routes and joint rates and to facilitate the movement of shipments without carriage in different cars or breaking of bulk, it follows that it must permit its cars to go to such destinations as are selected by the shipper. It can have no accurate knowledge of what those destinations will be. The shipper will naturally select the market which is most advantageous to him. He may, therefore, ship in one direction at one time and in another direction at another time. If the carrier must respond in damages because of its inability to furnish cars at a time of unusual demand for cars, it seems to me that the right of that carrier to confine its equipment to its own rails must be recognized; but that right was specifically denied to the respondent in the instant case in *Missouri & Illinois Coal Co. vs. I. C. R. R. Co.*, 22 I. C. C. 39.

"In the original Act, as well as in amendments

thereto which have broadened, extended, and strengthened the Commission's jurisdiction and powers, the Congress has carefully refrained from transferring to, or conferring upon, the Commission any jurisdiction or power which properly belongs to the judicial branch of the Government.

"For all of these reasons, together with the fact that the Commission's orders for the payment of money are only *prima facie* evidence in the Courts, in connection with which the Court may receive additional testimony which has not been presented to the Commission, I think that the question of requiring a carrier to provide itself with additional facilities or respond in damages for failure so to do is essentially a judicial question jurisdiction of which reposes in the Courts, which have authority to create and direct the conduct of receiver-ships, and not in the Commission, which has been created to exercise certain delegated powers legislative in character. I am, therefore, unable to agree with the majority report.

"I am authorized by Chairman Harlan and Commissioner Clements to say that they concur in these views."

Supreme Court of the United States

THE UNITED STATES and INTERSTATE
COMMERCE COMMISSION,

Appellants,

THE PENNSYLVANIA RAILROAD
COMPANY,

THE UNITED STATES, INTERSTATE COM-
MERCE COMMISSION and THE CREW
EVLICK COMPANY,

Appellees,

THE PENNSYLVANIA RAILROAD
COMPANY.

Nov. 22-23,
October Term,
1914.

INTERVENING PETITION FOR LEAVE TO FILE BRIEFS, &c.

THE PETITION TO BE TREATED AS A BRIEF BY
AMICI CURIAE IF THE COURT SO ORDERS.

MANUEL B. CLAYKE/
CHARLES W. ATWATER

Amici Curiae and Counsel for Franklin
Rock Company.

Office and Post Office Address.

41 Broadway

Barren of Holbrook

New York City

Supreme Court of the United States.

THE UNITED STATES AND INTER-
STATE COMMERCE COMMISSION,
Appellants,

against

THE PENNSYLVANIA RAILROAD
COMPANY.

THE UNITED STATES, INTERSTATE
COMMERCE COMMISSION and
THE CREW-LEVICK COMPANY,
Appellants,

against

THE PENNSYLVANIA RAILROAD
COMPANY.

Nos. 340-341
October Term,
1916.

Petition For Leave to File Brief, Etc. 3

TO THE HONORABLE THE SUPREME COURT OF THE
UNITED STATES:

The petition of Samuel B. Clarke and Charles
W. Atwater, members of the Bar of this Court,
acting as friends of the Court and also on behalf
of their client, the Sterling Salt Company, re-
spectfully shows:

- 4 FIRST.—That the dual capacity in which petitioners are acting seems to be justified by the remarks of the Court in the case of *Northern Securities Co. v. United States*, 191 U. S., 555-6.

- SECOND.—That the reason why this application was not made sooner is that your petitioners were not advised that the above entitled cases had been advanced for argument until about the time of the argument and had no opportunity to examine the briefs filed by the parties until after the argument, and that since the argument some time has been consumed in suggesting to counsel for the parties
- 5 the advisability of themselves bringing to the attention of this Court the matters to which this petition relates.

- THIRD.—That your petitioners are attorneys and counsel for the Sterling Salt Company in a proceeding (I. C. C. Docket No. 8407), submitted to and now pending decision before the Interstate Commerce Commission, which proceeding involves questions similar to questions raised in the above entitled cases now pending decision before this Court. In that proceeding the Sterling Salt Company is complainant and The Pennsylvania Railroad Company and the Genesee & Wyoming Railroad Company are respondents. The Sterling Company claims and one of the Railroad Companies admits, while the other Railroad Company did not contest the proofs that the Sterling Company mines rock salt at its plant at Halite, New York, divides the product into grades ranging in size from large lumps to particles smaller than wheat grains, and ships the separate grades, without barrels, boxes or sacks or other container, in loose bulk, in carload lots
- 6

over the lines of the respondents' railroads from Halite to various points of destination in New York and other States; that for the purpose of the shipments the respondents place ordinary box cars on railroad tracks, connected with respondents' railroads, at points convenient for loading the cars from the Company's breaker spouts which are let down into the upper part of the side door openings of the cars and the salt allowed to run through the spouts and fall on the floors of the cars; that, for convenience and economy in loading and unloading and to prevent waste of salt in loading and unloading, and in transit, it is necessary that the door openings should be tightly closed on the inside, at least to the height of a minimum load, by what are sometimes known as inside grain doors or by boards nailed to the inside of the door-posts; that in the case of each car such door equipment is supplied by the Sterling Company at an expense of about One Dollar per car; that for a considerable time prior to February 1st, 1915, the Railroad Companies made a practice of reimbursing the Sterling Company to the amount of the expense not exceeding One Dollar per car; and that by filed regulation schedules, effective the one February 1st, 1915, and the other February 15th, 1915, the Railroad Companies abrogated the practice of reimbursement and have since in that way placed the burden of supplying said inside door equipment, without reimbursement, upon the Sterling Company. The Sterling Company claims and the Railroad Companies deny that it is the legal duty of the Railroad Companies to provide and furnish said inside door equipment, and that said abrogating regulation schedules ought to be set

10 aside by the Interstate Commerce Commission and the prior practice reinstated.

FOURTH.—That from the briefs of the parties and letters about the oral argument received from counsel for the parties in the above entitled cases now pending in this Court, it appears (as your petitioners believe) that the points set out in article Fifth hereof (which your petitioners believe ought to be decisive of the issues in the above entitled cases and also in the said proceeding of the Sterling Salt Company before the Interstate Commerce Commission) have not been
11 brought to the attention of this Court either orally or in writing.

FIFTH.—That said points are as follows:—

POINT I.

“Transportation”, which, by Section 1 of the Interstate Commerce Act, as amended, it is the duty of the carrier to provide and furnish, is nothing more nor less than transportation provided, or to be provided, for “property transported.” Hence, the partial statutory definition
12 of transportation in Section 1 cannot be completed without the definition of “property transported”, which is provided for by the statute, though not expressed therein.

POINT II.

The phrase “property transported” in Section 1 of the Act (and its synonyms in that and other sections: “property designated herein”, “property for transportation”, “interstate traffic for

transportation" and "freight") means property 13
 which has been transported, if you are thinking
 of the past, and property to be transported, if
 you are thinking of the future, and does not in-
 clude any property whatever except such as is to
 be or has been delivered to a consignee.

POINT III.

Rate schedules being on file and in effect, the
 definition of a carrier's duty to provide and fur-
 nish "transportation" is fully closed by the com-
 modity-description in the *separate part* of that 14
 carrier's rate schedules in which the Act (particu-
 larly Section 6 of the Act and Rule 4 of Tariff
 Circular 18A "Regulations to Govern the Con-
 struction and Filing of Tariffs and Classifica-
 tions" promulgated by the Interstate Commerce
 Commission pursuant to Section 6 of the Act) pre-
 scribes that property which carriers offer to trans-
 port shall be described. Hence, the only question
 which the definition so closed leaves unsettled is
 as to the definition's interpretation and meaning
 for the purpose of its application to any particu-
 lar state of facts.

POINT IV.

15

The principles and methods of interpretation
 determining the meaning of the definitions so
 closed for the purpose of application to a particu-
 lar state of facts are substantially the same as
 those which have been elaborated by the courts in
 cases arising under the import tariff laws.

Example No. 1. If the commodity-descrip-
 tion part of the definition means that oil in
 barrels, or salt in sacks, or lard in pails, or

- 16 horses in crates, or automobiles supplied with tarpaulin covers and with wheel blocks and appliances for attaching the blocks to the floor of a car, &c., &c., is the property which the carrier offers to transport (including delivery to the consignee), the carrier is under no duty to receive from a shipper the specified commodity unless it is in the specified container or is supplied with the specified covering, &c., when tendered; but if the specified commodity is in the specified container or is supplied with the specified covering, &c., when tendered, the carrier must provide a suitable place, suitably equipped (which may be the *inside* of a suitably equipped car,
- 17 if the car is first placed in a proper position on railroad tracks, by whomsoever owned, connected with the carrier's railroad) for receiving the commodity from the shipper, *must receive* the commodity when tendered by the shipper at that place, must provide a suitable car, suitably equipped, for carrying the commodity to its destination, *must carry* it, must provide at the destination a suitable place, suitably equipped (which may be the inside of a suitably equipped car, if first placed in a proper position on railroad tracks, by whomsoever owned, connected with the carrier's railroad) for delivering the commodity to the consignee, *must deliver* it, *including* containers, covers, blocking appliances, &c., at that
- 18 place to the consignee, and *must charge* and collect the specified tariff rate or charge on the commodity, *including* container or other ancillary property, and cannot impose upon the shipper or consignee the burden of supplying any property or service whatever needed for any one of these purposes; but if the carrier does not furnish all the property and services needed for the accomplishment of these purposes, and the shipper or consignee voluntarily supplies the deficiency, the carrier may, and the shipper or consignee is entitled to have the carrier, make compensa-

tion to the shipper or consignee for doing so.

Example No. 2. If the commodity-description part of the definition means that oil (or grain or coal or salt or any other commodity) without a container, and without any other sort of ancillary property, is the property which the carrier offers to transport, the carrier must receive the commodity when tendered by the shipper, without any container or other ancillary property, at the place provided by the carrier, and in other respects the carrier's duties and the shipper's rights are as stated in Example No. 1. Hence, if ordinary receiving platforms, ordinary cars and ordinary delivering platforms are not adequate means for receipt, carriage, and delivery of the oil (or salt or grain or other commodity) offered by the carrier to be "transported" without a container or other ancillary property, then additional appropriate means, such as tank cars (or grain doors, or boards tightly affixed to the inside of the door-posts of box cars, &c., &c.), must be provided and furnished by the carrier as part of its duty to provide and furnish "transportation" for "property transported."

POINT V.

The foregoing conclusions may also be arrived at by the reasoning outlined in the following Points VI-XI.

POINT VI.

The Interstate Commerce Act as amended divides exhaustively all property which is in any way connected with common carrier railroad transportation of commodities on land and with which the tank cars aforesaid and the inside car

- 22 door equipment aforesaid can possibly be classified, into three mutually exclusive categories, namely:— (1) "Railroad", conceived of, generally speaking, as tracks and all ancillary realty; (2) "Property transported" and its synonyms, conceived of as tangible commodities received or receivable by carriers from shippers for carriage by railroad to destination and delivery there to consignees; (3) "Transportation", conceived of as including all the rest of the property under contemplation.

POINT VII.

23

The Act expressly declares it to be the duty of carriers to provide and furnish "transportation".

POINT VIII.

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It follows from Points VI and VII that the question whether tank cars for the receipt, carriage and delivery of oil must be provided and furnished by carriers, and the similar question as to inside door equipment for the receipt, carriage and delivery of salt or grain or any other like commodity, may be solved by determining whether, in the first case, tank cars, and, in the second case, box cars so equipped are included in either the category of railroads or the category of property transported. If included in either of those categories, the tank cars or box cars so equipped need not be provided and furnished by the carrier; if not included, they necessarily belong to the third or transportation category and must be provided and furnished by the carrier.

POINT IX.

25

It is manifest that neither tank cars nor box cars so equipped belong to the "railroad" category. Do they belong to the category of "property transported"?

POINT X.

The answer to that question depends on the description (commonly styled the commodity-description) of the property which the carrier offers to transport in the separate part of the carrier's filed rate schedules in which Section 6 of the Interstate Commerce Act requires the description of such property to be stated. (See also Rule 4 of Tariff Circular 18A, "Regulations to Govern the Construction and Filing of Tariffs and Classifications", promulgated by the Commission pursuant to Section 6 of the Act.) 26

POINT XI.

It follows from Points VI to X inclusive that;—

1. If the commodity-description means that petroleum oil in carload lots without any container or other ancillary property connected with it is the property which the carrier offers to transport, the carrier must provide and furnish cars adequate for receipt from shipper, carriage to destination, and delivery there to consignee of the oil which a shipper may tender in quantities corresponding to the commodity-description; *i. e.*, the carrier must provide and furnish tank cars. 27

- 28 2. If the commodity-description means that grain (or salt or other like commodity), without any container or other ancillary property connected with it, is the property which the carrier offers to transport, the carrier must provide and furnish cars adequately equipped for receipt from shipper, carriage to destination, and delivery there to consignee of the grain (or salt or other like commodity) which a shipper may tender in quantities corresponding to the commodity-description; *i. e.*, the carrier must provide and furnish box cars having inside grain doors or boards affixed to the inside of the door-posts.

29

POINT XII.

- Inasmuch as the foregoing points rest directly on the provisions of the Interstate Commerce Act, and inasmuch as the authority which the Act gives to carriers to establish and file schedules of regulations and practices is limited to such regulations and practices as are not inconsistent with the provisions of the Act, it follows that no conclusion based on the foregoing points can be invalidated or weakened by anything whatever contained in a carrier's schedule of regulations and practices; except to the extent that it may be necessary for shippers to take the proper steps to have inconsistent regulation schedules annulled.

30

POINT XIII.

Since the statute itself provides in part by its terms and in part by reference to rate schedules the means of exact determination of a carrier's duty; since the definition of duty so provided for by the statute is the only definition to be considered, it being paramount over common law and all

other definitions; since the description of "property transported" in the rate schedules is essential to the complete closing of the statutory definition of carrier's duty; therefore (1) there is no question of reasonableness, but the question is one of strict law down at least to the interpretation of the definition as closed; and therefore (2) if the rate schedules were not brought to the attention of the Court below by the Railroad Company when the injunctions were applied for, the Railroad Company failed to present to the Court the proper basis for determining the question whether injunctions should issue and the injunctions should be set aside as having been improvidently granted. 31 32

SIXTH.—That petitioners desire to file a brief supporting said points. The brief has not yet been completed, but will be completed, signed and deposited with the Clerk of this Court and copies thereof mailed to the counsel for the parties to the above entitled cases now pending in this Court, if the Court so orders.

WHEREFORE your petitioners humbly pray:—

(1) That the Court may be pleased to receive this petition and order it on file, and to do thereupon such other things as, upon consideration thereof, to the Court may seem just and proper; or that the Court may be pleased to treat this petition as a brief. 33

SAMUEL B. CLARKE,
CHARLES W. ATWATER,
Amici Curiae and Counsel for
Sterling Salt Company,
Office and Post Office Address,
61 Broadway,
Borough of Manhattan,
New York City.

Verification.

34

STATE AND COUNTY OF NEW YORK, SS.:

EDWARD W. BROWN, being duly sworn, says: I reside at Dongan Hills, Staten Island, New York City. I am the Vice-President and General Manager of the Sterling Salt Company, a New York corporation having an office at 29 Broadway, Borough of Manhattan, New York City, which is also my business address; I have read the foregoing petition and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

35

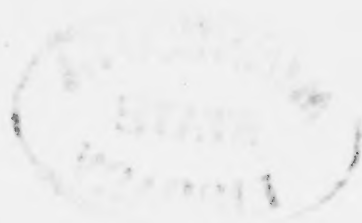
EDWARD W. BROWN.

Sworn to before me this }
8th day of November, 1916. }

ALICE A. ACOSTA,
Notary Public 169,
N. Y. Co.

(SEAL)

36



**UNITED STATES AND INTERSTATE COMMERCE
COMMISSION *v.* PENNSYLVANIA RAILROAD
COMPANY.**

**UNITED STATES, INTERSTATE COMMERCE
COMMISSION, ET AL. *v.* PENNSYLVANIA RAIL-
ROAD COMPANY.**

**APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA.**

Nos. 340, 341. Argued October 18, 19, 1916.—Decided December 11, 1916.

The powers conferred on the Interstate Commerce Commission by the Act to Regulate Commerce, as amended (Acts of February 4, 1887, 24 Stat. 379; March 2, 1889, 25 Stat. 855; June 29, 1906, 34 Stat.

584; and June 18, 1910, 36 Stat. 539), do not include the power to require carriers to provide and furnish oil tank cars—no question of discrimination being involved.

Without attempting to define the measure of the carrier's duty to satisfy the needs of shippers by adding in quantity or kind to its car equipment, *held*, that neither by the Act of 1887 nor the amendatory Act of 1906 did Congress intend that the enforcement of such duty might be compelled by orders of the Interstate Commerce Commission.

In reaching this conclusion much weight is properly attached to the fact that it accords both with the construction placed by the Commission upon the Act of 1887 before the Act of 1906 was adopted and also with the explanation which the Commission made to Congress concerning the occasion and scope of the Act of 1906 when that statute was in process of enactment.

In construing the amendment of 1906, the fact that, as here involved, it was drawn and recommended by the Commission justifies in this case the assumption that in legal import it was not intended to exceed the Commission's recommendation.

The neglect or refusal to furnish tank cars is not a "practice" within the meaning of § 15 of the Commerce Act, as amended June 18, 1910.

When a carrier in its published tariffs denies any obligation to furnish tank cars, the fact that it publishes rates for commodities so carried may not be construed as an offer, constituting a duty, to furnish such cars; and a finding by the Commission to the contrary is reviewable as a conclusion of law.

Whether the order of the Commission was invalid because requiring the Railroad Company to supply cars for movement over other lines, or because of being non-administrative, or uncertain and indefinite—not decided.

Chicago, Rock Island & Pacific Ry. Co. v. Hardwick Elevator Co., 226 U. S. 426, and other decisions of this court, explained and distinguished.

227 Fed. Rep. 911, affirmed.

On petition of the Pennsylvania Paraffine Works and the Crew-Levick Company the Interstate Commerce Commission made the following order:

"It is ordered, That the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist, on or before August 15, 1915, and thereafter to

abstain, from refusing upon reasonable request and reasonable notice therefor to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the act to regulate commerce and amendments thereto.

"It is further ordered, That said defendant be, and it is hereby, notified and required to provide, on or before August 15, 1915, and thereafter to furnish, upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

"And it is further ordered, That this order shall continue in force for a period of not less than two years from the date when it shall take effect."

The time of compliance was subsequently extended to November 15, 1915. In the meantime, the railroad company brought this suit to enjoin the enforcement of the order. A preliminary injunction was prayed and, upon a hearing by three judges, was granted. 227 Fed. Rep. 911. To review that action this appeal is prosecuted.

The Commission made quite elaborate findings, which, however, we do not think it is necessary to quote in full. It found the production of the oil companies, and the following additional facts:

(1) That 91% of the oil produced by the Paraffine Company was shipped in tanks, $1\frac{1}{2}\%$ in barrels loaded in cars other than tank cars, and $7\frac{1}{2}\%$ in pipe lines, while of the shipments made by the other company 86.8% moved in tank cars, 4.7% in barrels, and 8.5% in pipe lines.

(2) For a long time the bulk of refined oil in the United States has been shipped in tank cars and at present 91% is so transported. The railroad has been using tank cars for twenty-five years. The capacity of the cars is found, and they are so constructed that they may be rapidly

loaded at the refineries, and jobbers and dealers in refined oil throughout the country have the proper and necessary facilities for unloading the cars by gravity at their various stations.

(3) The only other method of transporting oil is in barrels or similar containers, the cost of which is from $3\frac{1}{2}$ to $3\frac{3}{4}$ cents a gallon above the cost of transportation in tank cars, and this makes such method of transportation practically prohibitive, and the refusal of the railroad to furnish an adequate supply of tank cars would tend to drive out of business refiners who are unable to supply themselves with enough cars to move their own products; and witnesses for the railroad admitted that tank cars are an economic necessity for the transportation of refined products.

(4) In 1887 the railroad acquired 1308 tank cars, some of which have since been sold to independent refiners, but it owned at the time of the hearing 499 cars, of which 482 are furnished to shippers of oil located on its lines.

(5) At the time of the hearing the Paraffine Company owned 54 tank cars and the Crew-Levick Company 57; and it was testified that these companies for five or six years have daily made inquiry for the delivery of cars to them and that formal orders for cars have been constantly on file in the railroad's offices.

(6) On November 11, 1912, shortly before the filing of the complaints before the Commission, complainants served notice upon the railroad company, requesting it to furnish a sufficient number of tank cars to ship respectively 450,000 gallons of oil per month from the Paraffine Company's refinery at Titusville and 600,000 gallons per month from the Glade (Crew-Levick Co.) Oil Works at Warren.

To the request of complainants, the railroad company replied:

"We beg to say that the railroad company is not pre-

pared to increase its present tank-car equipment but is prepared to transport the commodities in question when properly contained in barrels or other similar containers at rates that are fair, reasonable, and nondiscriminatory."

The Solicitor General, with whom *Mr. Robert Szold* was on the brief, for the United States:

The railroad is under a legal duty to furnish oil tank cars upon reasonable request.

The common law requires the common carrier to furnish reasonably adequate facilities for the transportation of the class of goods which it professes to carry. *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 133; *Hutchinson on Carriers*, 3d ed., § 495; *Beale and Wyman, Railroad Rate Regulation*, 2d ed., § 930.

The obligation is not simply to devote the specific property on hand to the public use, but to render adequate transportation service. *Wyman on Public Service Corporations*, §§ 253, 260, 797; *The Southwark*, 191 U. S. 1, 9. See also *Lukrawka v. Spring Valley Water Co.*, 169 California, 318, 329-332; *Haugen v. Albina Light & Water Co.*, 21 Oregon, 411; *Columbus v. Mercantile Trust Co.*, 218 U. S. 645, 659; *Leavell v. Western Union Telegraph Co.*, 116 N. Car. 211, 221; *United States Telephone Co. v. Central Union Telephone Co.*, 202 Fed. Rep. 66.

Additional equipment must be provided if necessary to accommodate reasonable public demands. *Branch v. Wilmington &c. R. R. Co.*, 77 N. Car. 347, 350; *Cobb v. Illinois Central R. R. Co.*, 38 Iowa, 601, 623; *Illinois Central R. R. Co. v. River & Coal Co.*, 150 Kentucky, 489, 491, 493; *Yazoo & Miss. Valley R. R. Co. v. Blum Co.*, 88 Mississippi, 180, 191, 192; *Ocean Steamship Co. v. Savannah Supply Co.*, 131 Georgia, 831; *People v. St. Louis &c. Railroad Co.*, 176 Illinois, 512.

Special facilities such as tank cars must be provided even though previously the railroad has not held itself

out so to do. *Baker v. Boston & Maine R. R. Co.*, 74 N. H. 100, 110; *Kansas Pacific Ry. v. Nichols*, 9 Kansas, 235; *State v. Railway Co.*, 47 Ohio St. 130, 139; *Railroad Co. v. Pratt*, 22 Wall. 123; *Covington Stock Yards Co. v. Keith*, *supra*; *Lorraine v. Pittsburg &c. R. R. Co.*, 205 Pa. St. 132; *Atlantic Coast Line R. R. Co. v. Geraty*, 166 Fed. Rep. 10; *Mathis v. Southern Ry.*, 65 S. Car. 271; *Cincinnati &c. Ry. Co. v. Fairbanks & Co.*, 90 Fed. Rep. 467.

This railroad has held itself out specifically to carry oil in tank cars. In its answer before the Commission it alleged that in the schedules of rates filed for carrying articles in tank cars it stated that no obligation was assumed to furnish tank cars. But the fact of such disclaimer does not appear from the record in the cases at bar. The obligation seems to be a matter of law, which follows as a necessary incident from the fact of the holding out and the public nature of the carrying business. See *Lloyd v. Haugh*, 223 Pa. St. 148, 154. The Commission's finding of fact that the railroad has held itself out to carry oil in bulk and in tank cars is not reviewable. *United States v. L. & N. R. R. Co.*, 235 U. S. 314, 320.

The duty is clearly imposed by the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, § 1.

Whatever be the duty at common law, here is an obligation of the statute to *provide* the required cars—not merely furnish such cars as chance to be on hand.

Recent decisions in this court recognize the obligation imposed. The comprehensive character of the amendment was indicated in *Chicago &c. Ry. Co. v. Hardwick Elevator Co.*, 226 U. S. 426. The case has been followed many times: *Yazoo &c. R. R. Co. v. Greenwood Grocery Co.*, 227 U. S. 1; *St. Louis &c. Ry. Co. v. Edwards*, 227 U. S. 265; *M., K. & T. Ry. Co. v. Harris*, 234 U. S. 412, 418; *Menasha Co. v. Chicago & Northwestern Ry.*, 241 U. S. 55, 58; *Ellis v. Interstate Com. Comm.*, 237 U. S. 434.

The evil to be remedied by the amendment of 1906

was in part the public injury due to insufficiency of the railroad's supply of tank and refrigerator cars. *Scofield v. Lake Shore &c. Ry. Co.*, 2 I. C. C. 90, 117 (1888); *In re Transportation of Fruit*, 10 I. C. C. 360, 373 (1904); Special Message by the President, of May 4, 1906; Report of the Commissioner of Corporations on the Transportation of Petroleum, 1906, House Doc. 812, 59th Cong., 1st sess.; see Sen. Doc. 428, *id.*; Cong. Rec., vol. 40, pt. 7, p. 6358; Cong. Rec., 59th Cong., 1st sess., vol. 40, pt. 2, p. 1958.

The legislative history of the amendment of 1906 shows that it was designed to meet this evil. Cong. Rec., 59th Cong., 1st sess., vol. 40, pt. 2, pp. 1764, 1765, 2005, 2109, 2155; *id.*, pt. 3, pp. 2081, 2103, 2104, 2109, 2155, 2241, 2260; *id.*, pt. 7, pp. 6374-6375, 6376, 6438, 6440, 6570.

The Commission has power to order the carrier to comply with a reasonable request to furnish oil tank cars. In support of the Commission's power, the Government relies particularly upon §§ 1, 12, and 15, as amended. Section 12 imposes upon the Commission the authority and duty "to execute and enforce the provisions of this act." Act of March 2, 1889, c. 382, 25 Stat. 858. One of the provisions which it is thus made the duty of the Commission to enforce is § 1, requiring railroads to furnish cars. The very purpose of imposing upon the carrier in 1906 the duty to furnish cars was to give the Commission jurisdiction to enforce that duty. This seems clear from a simple reading of the statute, as also from the debates, *supra*.

It is settled that a governing principle in the construction of the Commission's powers under the amendment of 1906 is the recognized purpose of the amendment to grant speedy and efficacious remedies for the enforcement of the duties imposed. *Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 498, 499.

The amendment of 1910 serves to remove all doubt.

The order in question deals with a regulation or practice of the railroad in furnishing the facilities of transportation, and § 15 in explicit terms authorizes the Commission by order to prescribe regulations or practices of that character. Rates and rebating had already been dealt with; the object of this amendment was to insure proper service. See the report of the Committee on Interstate and Foreign Commerce which, on April 1, 1910, recommended the bill to amend the Interstate Commerce Act, H. R. 17536, House Report No. 923, 61st Cong., 2d sess.; Cong. Rec., 61st Cong., 2d sess., vol. 45, pt. 5, p. 4571; *id.*, pt. 6, p. 5852; Conference Report No. 1588 on House Bill 17536, Sen. Doc. No. 623; Cong. Rec., vol. 45, pt. 8, pp. 8134 *et seq.*

That the power conferred upon the Commission was intended to be most comprehensive is shown by the terms of § 15. The words are "*any individual or joint classifications, regulations, or practices whatsoever.*" A regulation is a written rule governing a method of doing business. A practice clearly is not limited to such methods as have become habits. It includes any manner of performing the duties imposed by the act.

Consideration of the amendment to § 1 in the Act of 1910 also shows the all-embracing character of the practices over which the control of the Commission was extended. Section 1, as appears from the committee report recommending the legislation of 1910, is to be read in connection with § 15.

The railroad company's refusal was in writing and laid down a permanent rule. It was a regulation or practice as found by the Commission—a finding of fact which not being entirely unsupported by evidence, must be taken as conclusive. All the members of the court below agreed that the order dealt with a practice—a view fully sustained by *Atchison Railway Co. v. United States*, 232 U. S. 199; *Loomis v. Lehigh Valley R. R. Co.*, 240 U. S. 43, 50; *New*

York Shippers' Ass'n v. New York Central &c. R. R. Co., 30 I. C. C. 437; *Protection of Potato Shipments in Winter*, 26 I. C. C. 681, 685; *National Lumber Dealers' Ass'n v. Atlantic Coast Line R. R. Co.*, 14 I. C. C. 154; *Millers' Club v. Railroad Co.*, 26 I. C. C. 245; *Farmers Co-op. Ass'n v. Railroad Co.*, 34 I. C. C. 60; *Montgomery v. C., B. & Q. R. R. Co.*, 228 Fed. Rep. 616; *Newmark Grain Co. v. Southern Pacific Co.*, 30 I. C. C. 431.

The order was within the jurisdiction of the Commission even if not strictly a practice. Section 12 is here relied on and the concluding paragraph of § 15. The tendency of this court has been to uphold the broad powers granted. *Pipe Line Cases*, 234 U. S. 548. The policy of the act as a whole relies on expert and uniform administrative control rather than judicial orders.

The question whether the duty to provide and furnish cars is violated is administrative, and uniform control by the Commission is requisite. *Loomis v. Lehigh Valley R. R. Co.*, *supra*; *Minnesota Rate Cases*, 230 U. S. 352, 419, 420; *Mo. & Ill. Coal Co. v. Ill. Central R. R. Co.*, 22 I. C. C. 39; *St. Louis &c. Ry. Co. v. Arkansas*, 217 U. S. 136, 150.

Control by the Commission is imperatively required if the purpose of the act to prevent discrimination is to be effectuated. *Balto. & Ohio R. R. Co. v. Pitcairn Coal Co.*, *supra*; *Interstate Com. Comm. v. Ill. Central R. R. Co.*, 215 U. S. 452; *Texas & Pac. Ry. Co. v. Abilene Oil Co.*, 204 U. S. 426.

The order involves the exercise of no new or unusual power by the Commission.

The order is not subject to the objection that it compels the use of cars beyond the line of the railroad. *Mich. Central R. R. Co. v. Mich. R. R. Comm.*, 236 U. S. 615, 631, 632; *Pennsylvania Co. v. United States*, 236 U. S. 351.

The order is not void because indefinite or uncertain.

It follows the statute; seems as definite as that upheld in *Pennsylvania Co. v. United States*, *supra*, (see also *Baltimore & Ohio R. R. Co. v. Interstate Com. Comm.*, 221 U. S. 612, 621, 622); and is as specific as it could reasonably be. The objection here is premature, the railroad having made no effort to comply.

The order does not require an unlawful interference with the rights of owners of private cars. It affords sufficient time for compliance.

Mr. Joseph W. Folk for the Interstate Commerce Commission.

Mr. Charles D. Chamberlin and *Mr. David Wallerstein* filed a brief for the Crew-Levick Company.

Mr. John G. Johnson and *Mr. Thomas Patterson*, with whom *Mr. Henry Wolf Bikelé* and *Mr. F. D. McKenney* were on the brief, for the Pennsylvania Railroad Company.

By leave of court, *Mr. Charles W. Atwater* and *Mr. Samuel B. Clarke* filed a brief in behalf of the Sterling Salt Company, as *amici curiæ*.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

The question in the case is, Has the Commission the jurisdiction exercised by the order? It is not denied that the Commission has power over the general equipment of a carrier, but it is denied that it has power to require "vehicles of a special type having no reference to the safety of transportation," and to this distinction the argument of counsel for the railroad company, is addressed.

The judgment of the District Court had somewhat broader basis. The court said: "The act to regulate com-

merce does not confer upon the Interstate Commerce Commission all power over cars and other instrumentalities of shipment." And that, aside from special enactments, "Federal legislation regulating commerce, in so far at least as it is contained in the act of 1887 and its amendments, has thus far left carriers free to exercise their own judgment in the purchase, construction and equipment of their roads and in the selection of their rolling stock." Indicating that the law conferred upon the Commission the power to prevent and redress unfair practices and discriminations, the court further said: "We find nothing in the law which confers upon the Commission power to compel a carrier to acquire facilities it does not possess or to acquire better facilities than those it possesses, not with the object of preventing discrimination and preferences, but in order that the shipper may have larger, better, and perhaps more economical facilities."

And coming to consider the question of power conferred by the Interstate Commerce Act of 1887 as amended in 1906, the court decided that the amendment "added nothing to the original duty of the carrier as prescribed by the original act and as interpreted by the Commission, and vested in the Commission no increase of power over cars as instrumentalities of shipment."

To this proposition the United States and the Commission oppose the contentions that "it is the duty of every interstate carrier to provide and furnish upon reasonable request such cars as are reasonably necessary for handling the normal traffic of which it is a common carrier," and that the Commission is given jurisdiction to enforce the duty.

The power of the Commission has been given precedence and dominance in the argument, the extent of the duty of carriers coming in secondarily though important to be considered. In other words the main question pre-

sented is, whatever be the duty of carriers as to the equipment they must have or furnish, whether the Interstate Commerce Commission is the tribunal to enforce the duty.

A comparison of the act as passed in 1887 with the amendment of 1906 becomes necessary and a consideration of the rulings under the former as an interpreter of the latter.

The Act of 1887 (24 Stat. 379) provided that—

“The term ‘railroad’ as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term ‘transportation’ shall include all instrumentalities of shipment or carriage.”

The word “transportation” is the crucial word, and its definition in the amendment of 1906 is as follows:

“ . . . and the term ‘transportation’ shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor . . . ”

And this, it is contended, must be read in connection with § 12, as amended March 2, 1889, as follows:

“ . . . and the Commission is hereby authorized and required to execute and enforce the provisions of this act.” 25 Stat. 855, 858.

Section 1 of the Act of 1887 came before the Commission for consideration, and the duty thereunder of carriers to furnish tank cars for the transportation of petroleum, in

Scofield v. Lake Shore & Michigan Southern Railway Co., 2 I. C. C. 90. The opinion is too long to review. It is enough to say of it that it considered the conditions of the oil trade, the different methods of shipping oil in barrels and in tank cars, and stated that the latter method had become established, though very few of the railroads of the country owned tank cars; compared the cost and advantages of the methods, and from this declared that it was obvious that where the carriers did not furnish tank cars one shipper could not compete in all respects upon equal terms with another shipper who furnished tank cars for the transportation of his oil, unless he also furnished tanks; and, following a former decision, declared that it was properly the business of the carrier to supply the rolling stock for the freight he offers or proposes to carry, and that if the diversities of the traffic are such that this is "not always practicable, and consignors are allowed to supply it themselves, the carrier must not allow his own deficiencies in this particular to be made the means of putting at an unreasonable disadvantage those who make use in the same traffic of the facilities he supplies." To prevent such disadvantages or preferences the Commission decided it had power; to enforce the duty of supplying cars it decided it had not the power.

Section 3 of the act was asserted against the conclusion, and the Commission replied that that section applied only to facilities between connecting lines and did not embrace car equipment for the origination of freight; and, referring to § 1, it was said:

"The term 'instrumentalities of shipment or carriage,' as found in the first section of the statute, of course includes cars, but they are such cars as are provided by the carrier or used by it in interstate commerce, and the statute nowhere clothes the Commission with power to determine what kind of cars the carrier should use for this purpose and require the carrier to place upon its line for

use in this business such kind and number of cars as the Commission may decide will constitute a proper and necessary equipment of car service. The duty of every such carrier is none the less obligatory at common law, and by its charter to furnish an adequate and proper car equipment for all the business of this character it undertakes and advertises in its tariffs it will do. The statute does not undertake to clothe the Interstate Commerce Commission with the power by summary proceeding of compelling a railroad company to perform all its common-law duties, but leaves many of these to be enforced in the courts by suits for damages and by other proceedings. . . .

"The power, if it should be held to exist at all, on the part of the Interstate Commerce Commission to require a carrier to furnish tank cars when that carrier is furnishing none whatever in its business, would apply equally to sleeping cars, parlor cars, fruit cars, refrigerator cars, and all manner of cars as occasion might require, and would be limited only by the necessities of interstate commerce and the discretion of the Interstate Commerce Commission. A power so extraordinary and so vital, reached by construction, could not justly rest upon any less foundation than that of direct expression or necessary implication, and we find neither of these in the statute."

And it was declared that the law-making power had not itself undertaken the responsibility or clothed the Commission with the responsibility of directing a carrier to supply itself with any particular kind of equipment or cars, or, in fact, any equipment or cars at all for the transportation of freight over its line. It will be observed, therefore, that all of the elements that entered into the problem of the power of the Commission and the reasons which seemed to impel its exercise were considered.

There was a repetition of the elements and decision *In re Transportation, etc., of Fruit*, 10 I. C. C. 360, 373 (1904). It was there said that the Commission was of opinion

that it was the duty of railroad companies to furnish refrigerator cars for the transportation of fruit; that at one time carriers might have declined to provide this special kind of equipment but that the trade had so grown that the carriers "might as well decline to provide stock cars for the transportation of live stock as refrigerator cars for the carriage of perishable commodities." It was, however, added, "But this duty does not spring from the Act to regulate commerce, nor has this Commission any jurisdiction of that matter. It arises out of the common-law liability of the defendant railway companies as common carriers, and redress for failure to fulfill it must be sought in the courts."

Certain abuses were pointed out in that case and the tendency of the ownership of cars by private car lines to monopoly, and as a consequence it was urged upon the Commission that carriers should not be permitted to make exclusive contracts with private car lines like those then under consideration but should be compelled to provide their own equipment. The Commission replied, at page 377: "The facts before us call for no expression of opinion on that subject, and none is attempted."

This, then, was the view of the Interstate Commerce Commission of the duty of carriers and of its power over them; that is, that it was the duty of carriers to provide and furnish equipment for transportation of commodities and that this duty might expand with time and conditions, the special car becoming the common car, and the shipper's right to demand it receiving the sanction of law. But the Commission decided it was the sanction of the common law, not of the statute, and that the remedy was in the courts, not in the Commission. With this view we start as the first element of our decision.

But a change in the statute and remedy is asserted, a change, it is further asserted, consequent upon a demand for a greater administrative power and remedy. To sus-

tain the assertions the reports of the Commission are adduced, the legislation it recommended and the comments of the legislators.

It is especially to be noted that the amendment of 1906 is in the exact language of the recommendation of the Commission, as far as concerns that part which defines "railroad" and "transportation."

The Senate Committee on Interstate Commerce had instituted an extended inquiry and members of the Commission appeared before the special committee which had been appointed and presented a bill which the commissioners said embodied their recommendations and which the Commission subsequently made part of its nineteenth annual report. Significant explanations accompanied the bill. It was stated: "The form of the proposed measure, as will appear upon inspection, is an amendment of certain sections of the present statute. . . . Aside from the main question—the grant of power to the Commission, after hearing, to fix the future rate—several other amendments are proposed with the view of improving the law as a remedial measure, and these amendments will now be referred to under appropriate headings," one of which was as follows:

"Enlargement of Jurisdiction.

"It will be seen that the changes proposed in the first section are designed (a) to somewhat increase the jurisdiction of the law as to the carriers subject to its provisions and (b) to bring within the scope of the law certain charges and practices which are not now subject to regulation or respecting which there is dispute as to the power of the Commission. The first purpose is accomplished by leaving out of the first paragraph the phrase 'under a common control, management, or arrangement,' in order to reach certain classes of carriers which are now exempt from the obligations and requirements of the act. The second pur-

pose is sought to be accomplished by enlarging the definition of the term 'transportation,' so as to include the charges for various services, such as refrigeration and the like, which are now claimed to be beyond our authority. The obligation to furnish and provide the services here referred to is also imposed, which is likewise a point now in dispute. No other changes are proposed in the first five sections of the act, which are commonly spoken of as containing its principal or substantive provisions. In other words, the only amendment suggested in this regard is an enlargement of jurisdiction. In this connection, and as illustrative of the matters here referred to, the subject of refrigeration charges may be properly considered."

Then follows a consideration of refrigeration charges, the dispute that existed as to whether the shipper or the carrier should bear the expense of refrigeration, and the controversy over the jurisdiction of the Commission. It was said that "the Congress ought to make that service, by express provision in the law, a part of the transportation itself. We do not at this time recommend that carriers should be prohibited from using private cars or from employing the owners of such cars to perform the icing service if they find that course to their advantage, but we do recommend that these charges should be put on the same basis as all other freight charges. They should be published and maintained the same as the transportation charge, and be subject to the same supervision and control."

Under the heading "Terminal Roads, Elevator Charges, and Private Cars," the following was said:

"It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We should hesitate to recommend at this time so drastic a measure as that.

Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the service can be rendered or the facility furnished more advantageously both to the shipper and railway and without injury to the public if provided by the shipper himself."

After commenting on the amendment to § 16 and the added § 16a, the Commission explained that—

"It will thus be seen that the substantial amendments proposed are few in number and easily understood, the remaining changes being merely such as are needful to harmonize other parts of the act with the main amendments. . . . In brief, the proposed measure amends certain sections of the act to regulate commerce and is confined to such recommendations as are deemed necessary to effect its intended purpose, and thereby furnish adequate protection against excessive and discriminating charges."

It will be observed that there is not one word in the report that indicates that there was a necessity or desire for the power exercised in the order under review. Indeed, there was directly expressed an approval of private cars, and the opinion declared that they were a facility which could be furnished more advantageously both to the shipper and the railroad, without injury to the public, if provided by the shipper himself, and the recommendation was that they be brought under the jurisdiction of the Commission and thereby prevent oppressive and discriminatory practices; the principle being, to borrow from another, that all services incident to transportation, whether primary (carrying the goods) or accessorial (caring for the goods in transit whenever such care calls for special facilities or special equipment), should be subject to the same supervision and regulation.

But is there anything in the words of the amendment which exhibits on the part of Congress a larger knowledge of conditions than the Commission had, and that Congress, in a broader comprehension and judgment of the conditions and their remedy, gave the Commission a greater jurisdiction than that which in any way occurred to it was necessary?

The act as it was enacted in 1887 defined the term railroad and the term transportation, the latter as follows: "And the term 'transportation' shall include all instrumentalities of shipment or carriage." The definition was very comprehensive, and needed not the mobilization of its denotation; but this subsequently was attempted. Words, indeed, were multiplied—was meaning changed?

In 1906 the term "transportation" was defined to "include cars and other vehicles and all instrumentalities and facilities of shipment or carriage. . . ." The words are not much less general than the words of the Act of 1887. There is no advance made by them or enlargement of meaning. There was simply a useless tautology. But granting it was not and that Congress deemed a special declaration of things to be necessary, such declaration did not alter the relation of the companies to them. The duty which attached to "instrumentalities" of the Act of 1887 attached to the things covered by its comprehensive generality—to the things declared in the amendment of 1906, that is, to "cars," "vehicles," "facilities." And this duty under the Act of 1887, we have seen, had, in the opinion of the Commission, the sanction only of the common law. Under the amendment the most that can be said is that the duty is particularized. Its sanction is not enlarged.

But other words occur which, it is contended, have such effect. These words are: "And it shall be the duty of every carrier . . . to provide and furnish such transportation upon reasonable request therefor . . ."

This however is but the expression of a necessary implication. It was useless to declare that whatever a carrier must do, he must do "upon reasonable request." The duty having been imposed, it necessarily could be demanded. But the expression of the right, if it needed expression, adds nothing of indication to the previous words of the tribunal by which the demand was to be enforced.

But it is said the duty having explicit declaration the power to enforce it was found in § 12 as amended March 2, 1889, as follows: "And the Commission is hereby authorized and required to execute and enforce the provisions of this act." 25 Stat. 855, 858.

But this casts us back to our general considerations to which we may only add that there was no question of the duty of carriers either under the Act of 1887 or under the amendment of 1906. It was their duty under both to furnish the instrumentalities of transportation. The question is whether under the latter, as under the former, jurisdiction to enforce the duty was at common law in the courts or under the statute and in the Commission; and we have seen that it was the view of the Commission that the remedy was in the courts and that the amendment of 1906 was not intended to and did not change the remedy. In other words, that Congress in effect accepted the explanation of the Commission and approved its decisions. We repeat, the amendment of 1906 was drawn by and recommended by the Commission, and it may be assumed was not intended to have nor given larger import in the law than it had in the recommendation. *United States v. Louis. & Nash. R. R.*, 236 U. S. 318, 333 *et seq.*

There was amendment in 1910, not of § 1 in any particular relevant to our discussion, but of §§ 13 and 15. It was said by the committee which reported them for consideration that under § 15 as it then stood the author-

ity of the Commission to enter an order was "confined to the subject-matter of rates for transportation and regulations or practices 'affecting such rates' and the establishment of through routes where 'no reasonable or satisfactory through route exists.'" And the committee added that as recommended to be amended § 15 "will have its scope largely increased and the jurisdiction of the Commission will be much enlarged;" and that by the amendment the Commission is given jurisdiction to enter orders not only regarding rates but regarding classifications, regulations, or practices, whether they affect rates or not, and make orders requiring conformity thereto.

"Practices" were not otherwise or precisely defined either in the report or in the amendment recommended and as finally passed. Regarding only its broad generality anything may be asserted of it; regarding its context and the conditions which existed an immediate limitation of it is indicated, made necessary, as we shall presently show.

Section 15 provides that whenever after full hearing as provided by § 13 the Commission should be of opinion that any individual or joint rates collected by a common carrier or "that any individual or joint classifications, regulations, or *practices* whatsoever of such carrier or carriers subject to the provisions" of the act are "unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of" the act, the Commission is authorized and empowered to determine and prescribe what shall be the just and reasonable rate or rates and "what individual or joint classification, regulation, or *practice* is just, fair, and reasonable," and make an order that the carrier shall cease and desist from the charging of excessive rates and shall adopt the classification and conform to and observe the regulation or practice prescribed; the order to continue such time not exceeding two years as shall be prescribed by the Commission.

Applying the section, it is contended that the neglect to provide or certainly the refusal to furnish tank cars is a "practice" and became especially so by the reply made by the railroad to the request to furnish them.

Let us test the contention and see where it takes us. The request was for a special facility, a combination of package and car, and the question then is whether the neglect to provide it or to furnish it was a "practice" within the meaning of § 15. The far-reaching effect of an affirmative answer is instantly apparent, and there must be hesitation to declare it from the use of so inapt a word as "practice." Following a well known rule of construction, we must rather suppose its association was intended to confine it to acts or conduct having the same purpose as its associates. And there were many such acts for which the word could provide—practices which confused the relation of shippers and carriers, burdened transportation, favored the large shipper and oppressed the small one. These have illustrations in decisions of the Commission. And this was purpose enough, remedied all that was deemed evil in privately owned cars of any type. Beyond that it was not necessary to go; beyond that there were serious impediments to going; and we cannot but believe that if beyond that it was intended to go there would have been explicit declaration of the intent, with such provision as to notice and time and preparation as its consequences would demand—not ambushed in obscurity and suddenly disclosed by construction to turn accepted custom into delinquency, a construction that could be disputed and was disputed.

Three commissioners out of seven dissented, they declaring that if the act conferred power upon the Commission to order a carrier to enlarge its complement of cars it would follow that the Commission had also the power to order enlargement of terminal facilities, increase in the number of locomotives, and extension of tracks or branches.

In fact, it was said that no facility of transportation would be exempt. The purpose of the provision reviewed was declared to be the regulation of facilities possessed by the carrier, that there should be no unjust discrimination, and the plain intent to be that the shipper should not be required to deal with any other than the carrier. And this, as far as we can glean from the extensive congressional literature, was the end sought. In other words, it was on account of the abuses of the private car system, not of its uses, that legislation was urged.

There was some sentiment outside of the Commission for the abolition of the private car system, but abolition was not attempted. It would have been a short cut to the solution of the problems and could easily have been accomplished by requiring the railroads to furnish all of the equipment necessary for taking care of all kinds of traffic. But neither the Government nor the Commission contends for such an extreme, and, to forestall the charge that the order has such tendency, each represents that the duty of the carrier to furnish special equipment is not absolute but relative to the conditions of trade and the business of the shipper. This weakens the principle upon which the duty is based. If there be a duty, it would seem necessarily to be universal. And such contention is growing.

A friend of the court appears in the form of a Salt Company and presents an argument in support of the order of the Commission and asserts the right to a special equipment for the transportation of salt in bulk.

Little more need be said. Private cars came into existence as conveniences or necessities to particular businesses, developing by degrees and differentiating according to conditions. It was said in argument that there are different kinds of tank cars for different oils and liquids, and there are cars for live stock, fruit, live poultry, milk, and, as we have seen, salt in bulk. What others there are neither the record nor the argument has given us informa-

tion, nor the extent of their specialization. However, the information is not needed. The facts of the present case illustrate the condition of the carriers of the country. Describing it, the Commission says:

"The bulk of the movement of refined oil is in tank cars owned by the shippers. In 1887 the Pennsylvania Railroad acquired 1,308 tank cars, some of which have subsequently been sold to independent refineries. Defendant now owns 499 tank cars, all that remain of those purchased in 1887 and 482 of which are furnished to shippers of oil located on its lines. The other railroads east of the Mississippi River own, in the aggregate, only 303 tank cars. The privately owned tank cars east of the Mississippi aggregate about 27,700, and the total number of tank cars owned in the United States was given as approximately 40,000."

This, then, was the situation of the railroad, not dissimilar to that of other railroads, not therefore created in deliberate fault but in accommodation to conditions useful to shippers, advantageous to the railroad, beneficial to the public, as the Commission had declared; and yet a change is suddenly required. The burden of the requirement we shall presently notice.

Of course, if there is a duty upon a carrier to furnish tank or other special cars upon request, its enforcement cannot be arrested by the burden it imposes; but here again the thought obtrudes, which we have already expressed—it may be to tiresome extent—that if Congress had intended such consequence with all that it implies of expense, directly and indirectly, it would not have left its intention to be evolved from obscure language but would have put it in explicit declaration and with notice and time for accommodation to it.

It is to be remembered that the tank car is both package and car, must have special mechanical means of loading and unloading. May these, too, be ordered? Are they

not a "manner and method of presenting, marking, packing, and delivering property for transportation," to use the language of § 1, as amended?

It is difficult to particularize all that the ruling of the Commission implies of power. What of omission or commission in the carrier's relation to the public may not be said to be a practice or practices in the broad sense attempted to be given to those words? A railroad's powers are its duties, bearing, of course, obligations; and all of them by the asserted construction are swept under the jurisdiction of the Commission—so swept by a single word, not of itself apposite, and determined besides, by its association, against the contention. This was apparent to the dissenting commissioners and repelled their concurrence. Well might they have recoiled from going to such extreme upon doubtful implication and have been impelled to declare as they did declare that if such power was given it logically and necessarily extended to every facility of transportation.

As to whether this is desirable, we express no opinion, and we only mean now to say that it was not expressed as desirable in the statutes which we have considered, nor was there a word or a line from the Interstate Commerce Commission, so far as the record shows or intimates, of recommendation of such result. Indeed, there is intimation that such result would be radical and, as said by the railroad company, "the Safety Appliance Acts indicate that when Congress contemplates the imposition of obligations with respect to the equipment of carriers, it covers the subject by careful specific rules." And we may further say with the company that "it is pertinent to inquire why committees of Congress should consider, as they continue to do from time to time, the wisdom of devolving on carriers the duty to furnish steel coaches for passenger traffic, if already the provisions of the Act to Regulate Commerce are broad enough to cover matters of this kind." And

there is strength in the observation of the railroad company that if the argument based upon the word "practice" or "practices" were sound "it could be contended with equal reason that every detail of railroad operation is a practice within the meaning of the Act, why should the Commission ask that it be empowered to require the use of the block signal system? (Report of 1913, page 82.) Why should the Commission make this request if, because of its jurisdiction with respect to practices, it is already endowed with power to regulate the details of operation of carriers?"

The United States and the Commission insist that they have authority of cases for their two fundamental propositions, to-wit: (1) That it is the duty of the railroad to furnish equipment for the transportation of products; and (2) That the Commission has the jurisdiction to enforce that duty.

The authorities upon the first proposition we are not concerned to review. The duty, as far as this question is concerned, may be admitted—certainly admitted in its general sense. But we need not pause to distinguish its application in the cases to special equipment as distinguished from common equipment, or how much the decisions were based upon the belief of the shipper, justified or encouraged by the railroads, that the equipment required would be furnished.

With the second proposition we are concerned, and a consideration of the cases becomes necessary as they are cases in this court and are cited to sustain the power of the Commission. They are as follows: *Chicago, Rock Island & Pacific Ry. Co. v. Hardwick Elevator Co.*, 226 U. S. 426; *Ellis v. Interstate Commerce Commission*, 237 U. S. 434; *Yazoo, &c. R. R. Co. v. Greenwood Grocery Co.*, 227 U. S. 1; *Missouri, Kansas & Texas Ry. Co. v. Harris*, 234 U. S. 412; *Menasha Paper Co. v. Chicago & N. W. Ry. Co.*, 241 U. S. 55.

The *Hardwick Elevator Case* passed upon a law of Minnesota, known as the Minnesota Reciprocal Demurrage Law, which made it the duty of a railroad company on demand from a shipper to furnish cars for transportation at terminal points within 48 hours and at intermediate points within 72 hours after such demand, Sundays and legal holidays excepted. A penalty was imposed for each day's delay. This court held that by § 1 of the Hepburn Act Congress had legislated concerning the delivery of cars in interstate commerce by carriers subject to the act. This was based upon the definitions of § 1 and the provisions of §§ 8 and 9. The questions in the case were not those in the present case. The kinds of equipment were not involved nor the questions dependent upon them. The only question was as to whether Congress had entered the field of regulation.

In *Yazoo &c. R. R. Co. v. Greenwood Grocery Company* there was also involved a statute which penalized delays in delivering cars. It was held to be within the decision of the *Hardwick Elevator Case*, as it undoubtedly was.

In the *Harris Case*, the Carmack Amendment was decided as not excluding a state statute allowing an attorney's fee in certain actions based on claims for small amounts against railway companies. It has no relevancy to the present case.

The *Ellis Case* grew out of a right asserted by the Interstate Commerce Commission to inquire whether Armour & Company, shipping packing house products in commerce among the States, was controlling the Armour Car Lines and using them as a device to obtain concessions from the published rates for transportation. A series of questions were put to a witness in regard thereto which he refused to answer, and proceedings to compel his testimony were instituted. A question of the power of the Commission was presented and that was made to depend upon whether the Armour Car Lines was a com-

mon carrier subject to the Interstate Commerce Act. It was replied that the Car Lines Company had no control over the motive power and movement of the cars and was not a common carrier subject to the act. And this was said: "It is true that the definition of transportation in § 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth." The language was perfectly apposite to the question under consideration, the relation of the Armour Car Lines to the Armour Company and to the railroad. The cars the latter obtained from the Car Lines Company constituted the equipment of the railroad company and were, of course, subject to the provisions of the Interstate Commerce Act.

The question with which the present case is concerned was not presented to the court nor intended to be decided. The testimony sought by the Commission was to expose and prevent what were supposed to be discriminatory practices, and the right to require the testimony depended, it was the effect of the decision, upon the relation of the Armour Company to the Armour Car Lines through the railroad, and whether what was paid to the Armour Car Lines was in effect paid to the Armour Company and made a means of discrimination. This view was rejected and it was said: "It does not matter to the responsibility of the roads whether they own or simply control the facilities, or whether they pay a greater or less price to their lessor"—the lessor of that case being the Armour Car Lines; and, as it was not shown that it was merely the tool of the Armour Company, it had immunity from the investigation. The case, therefore, is not authority for the proposition which it is urged to support.

Menasha Paper Co. v. Chicago & N. W. Ry. Co., needs

no comment. It quotes but attempts no explanation of the words of the statute that is relevant to our present inquiry. Indeed, in all of the cases the points of inquiry and decision were different from the case at bar. They declared or enforced or recognized the general duty of carriers under the particular facts and the law to which the carriers were subject.

It is next contended by the United States that the railroad has held itself out specifically to carry oil in tank cars, and the fact, it is said, has been found by the Commission and is not reviewable, citing *United States v. Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320. We are unable to assent.

The railroad company in its answer to the petition before the Interstate Commerce Commission alleged that Rule 29 of the official classification No. 39 providing rates for articles in tank cars stated that the carriers whose tariffs were covered by such classification did not assume any obligation to furnish tank cars. There is a concession in the brief of the Interstate Commerce Commission that such was the published tariff, though contesting its efficacy to divest the company of its duty as a carrier. This might be if there was a duty; but the United States seeks to establish the duty from the offer of the company and must take the offer as made and cannot, nor can the Commission, ignore its explicit qualification that the company assumed no obligation to furnish tank cars. The finding of the Commission, therefore, was one of law and not of fact, and is reviewable.

The railroad company, besides the contentions of want of power in the Commission to make the order under review, objects to it (1) in that it is defective because it requires the company to supply cars for movement over the lines of other carriers; and (2) that it is not administrative in character, but is uncertain, indefinite and unlawful.

In support of the first contention the railroad company points out that the company owns more tank cars than all of the other carriers east of the Mississippi River, amounting at the time of the hearing to 499 cars. The total ownership of other cars east of the Mississippi River amounted to 303, and the privately owned tank cars to 27,700. It therefore appears, it is said, that the railroad ownership is less than 3% of the total ownership and that of this 3% the company is furnishing more than half. The company, therefore, asserts that if it be compelled to furnish all of the tank cars required for the transportation of oil on its line irrespective of their destination, it is obvious that a burden out of all proportion is placed upon it. It further complains that although the New York Central Railroad serves the oil companies equally with it, no order is made against that company but, on the contrary, the entire burden is devolved upon it.

In support of the second contention the company asserts that the order of the Commission is not administrative is indicated by decisions of this court in actions for failure to furnish cars. The cases are: *Louisville & Nashville R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70 (1912); *Eastern Ry. Co. v. Littlefield*, 237 U. S. 140 (1915); *Penna. R. R. Co. v. Puritan Coal Mining Co.*, 237 U. S. 121 (1915); *Illinois Central R. R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275 (1915).

Again, it is charged that the order expressed but a legislative principle, has the generality of such principle without any criterion of application. The order requires the company to "provide . . . upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce." What is a reasonable request or reasonable notice, and what are normal shipments? The order affords no answer and if the railroad company ventures, however honestly,

any resistance to a request or notice not deemed reasonable or to shipments not deemed normal it must exercise this right at the risk of a penalty of \$5,000 a day against all of its responsible officers and agents. These considerations are very serious (*International Harvester Co. v. Kentucky*, 234 U. S. 216; *Collins v. Kentucky*, 234 U. S. 634), but the view we have taken of the power of the Commission to make the order, however definite and circumscribed it might have been made, renders it unnecessary to pass upon the contentions.

Decree affirmed.